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1093

No. 2959

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United States  
Circuit Court of Appeals  
*1093*  
For the Ninth Circuit,

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CITY OF BOZEMAN, a Corporation, JOHN A.  
LUCE, Mayor of the City of Bozeman, and  
C. A. SPIETH, City Clerk of the City of  
Bozeman,

Appellants,  
vs.

SWEET, CAUSEY, FOSTER & COMPANY, a  
Corporation, JAMES N. WRIGHT & COM-  
PANY, a Corporation, and C. W. McNEAR,  
& COMPANY, a Corporation,

Appellees.

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Transcript of Record.

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Upon Appeal from the United States District Court for the  
District of Montana.

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Filed

APR 7 - 1917

F. D. Monckton,  
Clerk



United States  
Circuit Court of Appeals  
for the Ninth Circuit.

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LUCE, Mayor of the City of Bozeman, and  
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& COMPANY, a Corporation,

Appellees.

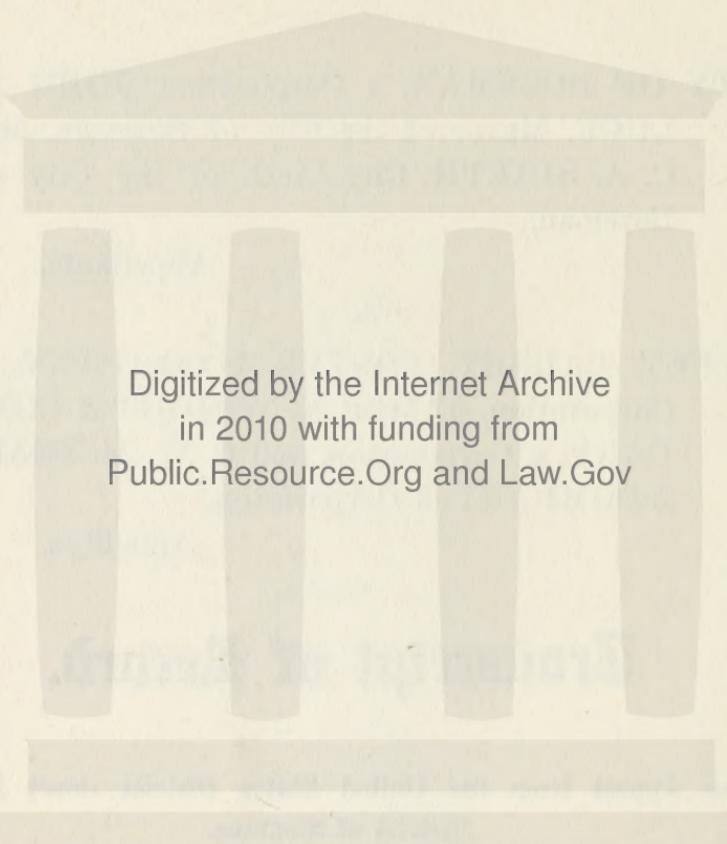
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Transcript of Record.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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**Names and Addresses of Solicitors of Record.**

H. D. KREMER, Esq., and GEORGE Y. PATTEN,  
Esq., of Bozeman, Montana,

Solicitors for Defendants and Appellants.

Messrs. DAY & MAPES, of Helena, Montana,

Solicitors for Plaintiffs and Appellees.

[1\*]

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*In the District Court of the United States in and for  
the District of Montana.*

IN EQUITY—No. 77.

SWEET, CAUSEY, FOSTER & COMPANY,  
JAMES N. WRIGHT & COMPANY, a Cor-  
poration, and C. W. McNEAR & COMPANY,  
a Corporation,

Plaintiffs,

vs.

CITY OF BOZEMAN, a Corporation, and JOHN  
A. LUCE, Mayor of the City of Bozeman, and  
C. A. SPIETH, City Clerk of the City of  
Bozeman,

Defendants.

BE IT REMEMBERED, that on July 14, 1916,  
the plaintiffs filed their Bill of Complaint herein, in  
the words and figures following, to wit: [2]

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\*Page-number appearing at foot of page of original certified Transcript  
of Record.

*In the District Court of the United States, District  
of Montana, Helena Division.*

IN EQUITY—No. —.

SWEET, CAUSEY, FOSTER & COMPANY, a Corporation, JAMES N. WRIGHT & COMPANY, a Corporation, and C. W. McNEAR, & COMPANY, a Corporation,

Plaintiffs,

vs.

CITY OF BOZEMAN, a Corporation, and JOHN A. LUCE, Mayor of the City of Bozeman, and C. A. SPIETH, City Clark of the City of Bozeman,

Defendants.

**Bill of Complaint.**

Come now the plaintiffs above named, and for cause of action against the above-named defendants sheweth unto your Honor:

1. That the plaintiff Sweet, Causey, Foster & Company was at all the times hereinafter mentioned and still is a corporation organized and existing under the laws of the State of Delaware and a citizen of the State of Delaware; that the plaintiff James N. Wright & Company was at all the times herein-after mentioned and still is a corporation organized and existing under the laws of the State of Delaware and a citizen of the State of Delaware; that the plaintiff C. W. McNear & Company was at all the times hereinafter mentioned and still is a corporation organized [3] and existing under the laws

of the State of Illinois and a citizen of the State of Illinois.

2. That the defendant City of Bozeman was at all the times hereinafter mentioned and still is a municipal corporation organized and existing under the laws of the State of Montana; that the defendant John A. Luce was at all the times hereinafter mentioned and still is the duly elected, qualified and acting mayor of the said City of Bozeman and a citizen of the State of Montana; that the defendant C. A. Spieth was at all the times hereinafter mentioned and still is the duly appointed, qualified and acting city clerk of the said City of Bozeman and a citizen of the State of Montana.

3. That this is a suit in equity between citizens of different states, and the matter in controversy, exclusive of interest and costs, exceeds the sum or value of three thousand dollars.

4. That, pursuant to the powers vested in municipal corporations of the State of Montana by the laws of said state, the duly elected, qualified and acting city council of said City of Bozeman, at a special meeting thereof duly held at the council chambers thereof in the City of Bozeman on the 28th day of February, 1916, duly and legally passed and enacted a certain resolution, known as Resolution No. 695, by the affirmative vote of all of the members thereof, the vote being by ayes and noes, and which said resolution was thereafter on said date approved by the mayor of said city, providing for the holding of a special election submitting to the taxpayers of the said city the question of the city issuing Water

Works Bonds upon the credit of the city, in the sum of two hundred thirty-five thousand dollars (\$235,000), the proceeds from [4] the sale thereof to be used as follows, to wit, one hundred thousand dollars (\$100,000), in redeeming the present outstanding Water Works Bonds, and the balance in extending, improving and enlarging the existing Water Works System and in acquiring an auxiliary or additional Water Works System from Bozeman Creek for the said city, a copy of which said resolution is hereto attached as Exhibit "A" and made a part hereof the same as if set forth at length herein.

That thereafter, at the same meeting and pursuant to the same powers, the city council duly and legally passed and enacted a certain other resolution, known as Resolution No. 696, by the affirmative vote of all the members thereof, the vote being by ayes and noes, and which resolution was thereafter on said date approved by the mayor of said city, providing for the holding of a special election for the purpose of submitting to the taxpayers of the City of Bozeman the question of the city issuing sewer bonds upon the credit of the city in the sum of seventy thousand dollars (\$70,000), the proceeds from the sale thereof to be used in extending, improving and enlarging the existing sanitary sewer system and storm sewer system of the City of Bozeman, a copy of which said resolution is hereto attached as Exhibit "B" and made a part hereof the same as if set forth at length herein.

5. That by the terms of said resolutions a special election was ordered to be held at the time of the gen-

eral spring election on April 3, 1916, for the purpose of ascertaining the will of the taxpayers to be affected thereby; that it was provided in said resolutions that separate ballots should be used for such special election, on one of which should be printed the terms "Water Works Bonds, [5] Bonds—Yes, Bonds—No," and on the other the terms "Sewer Bonds, Bonds—Yes, Bonds—No."

6. That under and by virtue of the provisions of said resolutions the city clerk was authorized and directed to give notice of such election as required by law, and said notice was given by posting in five public and conspicuous places in each ward throughout the said city, was also published in the "Weekly Courier," a weekly newspaper published in said city, once a week for five consecutive weeks, the first publication being on the 1st day of March, 1916, and the last publication being on the 29th day of March, 1916, and which said notices so posted and published were in words and figures as follows, to wit:

#### NOTICE.

#### SPECIAL CITY ELECTION.

Notice is hereby given that a special city election will be held in the City of Bozeman, State of Montana, at the time of holding the regular spring election, to wit: Monday, April 3, A. D. 1916. The polls to be open continuously from and including eight o'clock A. M., to and including six o'clock P. M. of said day. The polling places to be as follows: For the First Ward, being Precinct No. 1, at the Bozeman Hotel Annex; and the Second Ward, being Pre-

cinct No. 4, at the Court House; for the Third Ward, being Precinct No. 3, at the office of the Kenyon-Noble Lumber Company; and for the Fourth Ward, being Precinct No. 2, at the Council Chamber of the City of Bozeman.

Said special election will be held for the purpose of submitting to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana, 1907, who are also possessed of the qualifications of electors in the said City of Bozeman, the question of the said city issuing Water Works Bonds upon the credit of the said city in the sum of \$235,000.00, the proceeds from the sale thereof to be used as follows: \$100,000.00 for redeeming the present outstanding Water Works Bonds and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman.

The amount of bonds proposed to be issued is the sum of \$235,000.00, and the character of the said bonds, is as follows: They shall be known as "Water Works Bonds"; shall be dated July 1, 1916; shall be of the denomination of one thousand dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and of July in each year; shall be payable in twenty years and [6] redeemable in ten years. And the particular purpose for issuing said bonds is: First, to redeem the present outstanding water works bonds in the sum of \$100,000.00. Second: to extend, improve and en-

large the present water works system and acquire an auxiliary or additional water works system from Bozeman Creek, for the City of Bozeman, Montana.

At such election, the ballots shall contain the words:

“Water Works Bonds.”

“Bonds Yes.”

“Bonds No.”

And in voting the elector must make a cross thus “X” opposite the answer for which he intends to vote.

Dated at the office of the city clerk of the City of Bozeman, Montana, this 28th day of February, 1916.

C. A. SPIETH,

City Clerk.

That the notice with reference to the special election concerning the issuance of said Sewer Bonds was identical in terms as the notice last above set forth, except that it substituted the denominations and amounts of the bonds and the purposes for which they were proposed to be issued in connection with extending, enlarging and improving the sewer systems of said city.

7. That the said special election was held at the time of the general city election for said city on the 3d day of April, 1916, and at said election separate ballots and separate ballot-boxes, election books, sheets and certificates were used, and all voting and votes upon each of said questions were upon separate ballots, and the questions so submitted were voted upon separately at said election, and the counting of the ballots and the certification thereof, and

the canvass of the votes therefor, were all had and done separately with reference to each of the said questions; that at a meeting of the city council held on the 6th day of April, 1916, being the regular meeting following said election, the city council adjourned to meet in regular adjourned session on April 7, 1916, at which time the returns of said special election were [7] canvassed and the result thereof determined as follows, to wit, for the Water Bonds, "yes," 224; "no," 132; for the Sewer Bonds, "yes," 239; "no," 116; that from said canvass it appeared that the question of issuing the Water Bonds had carried by a majority of ninety-two (92), and the question of issuing the Sewer Bonds had carried by a majority of one hundred twenty-three (123).

8. That at the time of holding said special election [8] the said City of Bozeman was indebted in an amount exceeding the three per cent limit provided for by the Constitution and laws of the State of Montana, and that the question of extending the constitutional limit of indebtedness of said city for the purpose of procuring a water supply for its inhabitants, or constructing a sewer, was not submitted to the taxpayers affected thereby, as required by the Constitution and laws of the State of Montana, at said election, or at any election held prior thereto or thereafter; nor was the said question ever submitted to the taxpayers affected thereby except as hereinabove set forth.

9. That thereafter at a special meeting held on the 7th day of April, 1916, the city council, pursuant

to authority conferred by statute, appointed the 18th day of May, 1916, at 7:30 o'clock P. M., in the City Hall Building in the City of Bozeman, as the time when and the place where the issue of \$235,000 of Water Works Bonds and the \$70,000 of Sewer Bonds should be offered for sale at public auction, and the city clerk was directed to give notice of such sale by advertisement in the "Weekly Courier," a weekly newspaper published in said city, and in the "Financier," a weekly newspaper published in the City of New York, for four weeks before the 18th day of May, 1916, which said notice as directed to be given and as actually given was in words and figures as follows, to wit:

BONDS FOR SALE.  
CITY OF BOZEMAN,  
MONTANA.

\$235,000 5% Water Works Bonds.

Notice is hereby given that the City of Bozeman, in the State of Montana, will sell at public auction on Thursday, May 18, 1916, at seven-thirty o'clock P. M., at the Council Chamber in the City Hall Building in said City, the water works bonds of said City to the amount of [9] \$235,000, the said bonds to be of the denomination of One Thousand Dollars each; to be dated July 1, 1916; to be payable in twenty years and redeemable at the option of said City at any time after ten years and to bear interest payable semi-annually at a rate of five per cent per annum, the proceeds from the sale of said bonds to be used for the purpose of redeeming the present outstanding water works bonds in the sum of

\$100,000, and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for said City of Bozeman.

Said bonds will be sold to the highest bidder offering the highest price for them and said bonds will be sold at not less than their par value.

A copy of the verified transcript of all of the proceedings pertaining to this bond issue together with a financial statement of the said City of Bozeman, will be furnished upon application, to all prospective bidders.

Dated at Bozeman, Montana, April 12, 1916.

C. A. SPIETH,

City Clerk.

That the notice with reference to the sale of the said Sewer Bonds was identical in terms as the notice last above set forth, except that it substituted the denominations and amounts of the bonds as provided by the resolution for the sale of the Sewer Bonds.

10. That thereafter and pursuant to authority conferred by statute, the said city council, at its regular meeting held on the 7th day of April, 1916, duly and regularly passed and enacted an ordinance, known as Ordinance No. 456, being an ordinance directing the issuance of Water Works Bonds to the amount of \$235,000, a copy of which said ordinance is attached hereto as Exhibit "C" and made a part hereof the same as if set forth at length herein.

That at the same meeting and pursuant to the same authority the said city council duly and reg-

ularly passed and enacted an ordinance, known as Ordinance No. 457, being an ordinance directing the issuance of Sewer Bonds to the amount of \$70,000, a copy of which said ordinance is hereto attached as Exhibit "D" and made a part hereof the same as if set forth at length herein. [10]

11. That pursuant to said notices of sale the plaintiffs herein applied to and received from the city clerk of said city, under the seal thereof, the financial statement of said city, under date of April 1, 1916, a copy of which said financial statement is hereto attached as Exhibit "E" and made a part hereof the same as if set forth at length herein; that by said statement it appeared that the assessed value of the real estate and personal property within the City of Bozeman, as shown upon the assessment-roll for the year 1915, was \$3,209,196, and that the outstanding indebtedness of said city, exclusive of the indebtedness of Improvement Districts, was, at the time of holding said election, the sum of \$351,-802.62.

12. That on the 18th day of May, 1916, the city council of said city met in regular session at the council chambers at 7:30 o'clock P. M., for the purpose of conducting the sale of said Waterworks and Sewer Bonds, and that the defendant John A. Luce, as the mayor of said city, called the meeting to order and announced that the successful bidder for said bonds would be required to enter into a written contract with the City of Bozeman immediately upon the conclusion of the sale of said bonds, binding himself to take such bond issue or issues at the

amount or amounts bid, and that he would have two weeks in which to examine into the legality of the proceedings pertaining to said bond issues, and must then announce his acceptance or rejection thereof, as to the legality of said proceedings, and if he then asserted that said proceedings were illegal, he must in fact establish such illegality; that if the proceedings were in fact legal and the purchaser refused to accept the bonds at the purchase price thereof, then the city would retain the amount of [11] the certified checks of the successful bidders as liquidated damages, but if the proceedings were in fact illegal the said bidder would not be required to take the said bonds and pay the purchase price thereof; that at said meeting these plaintiffs attended by their agent and bid for said bonds par and accrued interest, and for the Water Works Bonds a premium of \$9,595.00, and for the Sewer Bonds a premium of \$2,835.00; that the bid of these plaintiffs, being the highest bid, was accepted, and, upon motion duly made and passed by the affirmative vote of all the members of said city council, the mayor and city clerk were authorized to enter into a contract with these plaintiffs as per the terms and conditions of the auction sale; that thereafter a contract in accordance with the vote of said city council was entered into between said city and these plaintiffs for the purchase of said bonds, which said contract was in words and figures as follows, to wit:

#### AGREEMENT.

THIS AGREEMENT, made and entered into this 18th day of May, 1916, by and between the City of

Bozeman, a municipal corporation of the State of Montana, the party of the First Part, and Sweet, Causey, Foster & Company, James N. Wright & Company, of Denver, Colorado, and C. W. McNear & Company, of Chicago, Ill., the parties of the second part; WITNESSETH:

WHEREAS, pursuant to public proposals therefore made by the party of the first part, an auction sale was had thereon, on even date herewith, whereby the parties of the second part became the purchasers of \$305,000.00 municipal bonds of said first party at and for the par value thereof, to wit, said sum of \$305,000.00 and in addition thereto a premium of \$12,430.00.

NOW, THEREFORE, in consideration of the mutual benefits to be derived by the respective parties in the premises, it is agreed that the parties of the second part will have two weeks in time from the receipt of the transcripts pertaining to said bond proceedings, from the date of the receipt of such transcripts by said second party in which to examine into the legality thereof, and then and there they must announce their acceptance or rejection thereof as to the legality of said proceedings. If the parties of the second part thereupon assert that said proceedings are illegal they must in fact establish such illegality. And if the proceedings are in fact legal, and said second parties refuse to accept said bonds at said purchase price then [12] and in that event the party of the first part is hereby authorized to take and keep and retain the amount of the certified checks deposited with said first part as

liquidated damages, but if said proceedings are in fact illegal or either of them so, then and in that event said second party shall be under no obligation to take said bonds and pay the purchase price therefor and said first party shall immediately thereon return the amounts of said certified checks in the sum of \$4,000.00 to the parties of the second part.

The parties of the second part shall furnish to the party of the first part proper and sufficient blank bonds with coupons thereto attached in all respects complete for execution, for each of said issues free of expense.

If for any reason the parties of the second part shall not deliver and pay over to the party of the first part said purchase price of said bonds, including said premium bid, upon the date of the issuance of said bonds, then and in that event the parties of the second part shall pay to the party of the first part interest at the rate of 5% per annum from the date of said bonds to the date of delivery in addition to said purchase price of said bonds including said premium.

The party of the first part agrees to promptly take such steps to make these issues legal as may be required and deemed necessary by the attorneys of the parties of the second part, and prior to the delivery of the bonds to the parties of the second part to promptly furnish them with evidence of the legality of the issues in form satisfactory to their attorneys, and to deliver the properly executed bonds to the parties of the second part either in Denver, Colo.,

or in Chicago, Ill., at the option of the parties of the second part, free of exchange and collection charges.

IN WITNESS WHEREOF, the party of the first part has caused its name and seal to be affixed hereto, by its Mayor and City Clerk duly authorized and the parties of the second part have signed the same by their duly authorized representative, the day and year in this instrument first above written.

THE CITY OF BOZEMAN, MONTANA.

By JOHN A. LUCE,  
Mayor.

[Seal]

Attest: C. A. SPIETH,  
City Clerk.

SWEET, CAUSEY, FOSTER, a Co.  
JAS. N. WRIGHT & CO.  
C. W. McNEAR & CO.

By L. E. TORRENCE,  
Representative.

That pursuant to the terms of said contract and as a part of said bid these plaintiffs delivered to the defendant C. A. Spieth, as city clerk of said city, two certified checks drawn upon the Interstate Trust Company, of Denver, Colorado, for the sum of \$2,000.00 each, payable to the order of the City of Bozeman, in accordance with [13] the terms of said contract, as security for the compliance with the said terms on the part of these plaintiffs.

13. That immediately after the execution of said contract and on the 26th day of May, 1916, the City of Bozeman, acting through its mayor, the defendant

John A. Luce, submitted to these plaintiffs a certified transcript of the proceedings of said city council relative to the issuance of said bonds, which said certified transcript was received by these plaintiffs at the City of Denver on the 27th day of May, 1916; that thereafter and within the two weeks specified in said contract, the plaintiffs submitted the legality of said issue of bonds to their attorneys, Messrs. Pershing, Titsworth & Fry, being attorneys engaged in the practice of law in the City of Denver, Colorado, and familiar with the questions involved, and received from said firm of attorneys an opinion advising these plaintiffs that said issue of bonds was illegal; that within the period of two weeks after the furnishing of the transcript of said proceedings these plaintiffs notified the City of Bozeman and the defendant John A. Luce, its mayor, that their attorneys had declined to approve the legality of said proceedings, and, on June 10, 1916, transmitted to said city and the defendant John A. Luce, its mayor, the written opinion of said attorneys, advising the City of Bozeman that said issue of bonds was illegal because the issuance thereof would create an indebtedness in excess of the constitutional limit of indebtedness as prescribed by the Constitution of the State of Montana, and because the question of issuing refunding bonds and new bonds for the purpose of procuring an additional water supply was a double question and had been submitted as one question to the taxpayers affected [14] thereby, and that said taxpayers had not been afforded an opportunity to vote upon the

question of issuing new Water Works Bonds as a separate proposition.

14. That prior to the commencement of this action, and on the 20th day of June, 1916, these plaintiffs demanded of the defendant City of Bozeman and of the defendant C. A. Spieth, its city clerk, the return of the certified checks theretofore delivered by these plaintiffs to said defendant Spieth, or a compliance with the provisions of said contract to the effect that said city would promptly take such steps as might be required and deemed necessary to make the issue of bonds sold to these plaintiffs legal, but that notwithstanding said demand the defendant City of Bozeman has failed and refused to take any steps relative to curing the defects in the issuance of said bonds, and the defendant John A. Luce, as Mayor, and the defendant C. A. Spieth, as city clerk, of said city, have failed and refused to return to these plaintiffs the two certified checks so delivered to them, but, on the contrary, as these plaintiffs are advised and believe, said defendants Luce and Spieth have attempted to negotiate said certified checks and to deposit the money thus received in the city treasury of the City of Bozeman as forfeited to said city, and that said city has failed and refused, and still fails and refuses, to issue to these plaintiffs legal bonds of the denominations and amounts specified in said bid and award, as evidenced by said contract, or to return to these plaintiffs said certified checks.

15. That these plaintiffs are advised by their attorneys, and believe, that said proposed issue of

bonds for both water works and sewer purposes is in fact illegal in [15] the following particulars, to wit:

(a) That at the time of the submission of the question of the issuance of said bonds to the taxpayers affected thereby said City of Bozeman was indebted in excess of three per cent of the taxable value of the property of said city as the same appeared upon the assessment roll of said city for the year 1915, which fact will more fully appear by reference to the financial statement of said city attached hereto and heretofore referred to as Exhibit "E"; that the question of extending the limit of indebtedness of said city for the purpose of procuring a water supply or the construction of sewers in excess of the three per cent limit of the taxable property and within the limit of ten per cent of the taxable property, as provided by the Constitution of the State of Montana, was never submitted to the taxpayers affected thereby.

(b) That the issuance of the \$235,000 of Water Works Bonds and \$70,000 of Sewer Bonds would in fact increase the indebtedness of said city beyond the thirteen per cent limit of indebtedness as fixed by the Constitution of the State of Montana, assuming that the question of extending the limit of indebtedness beyond the three per cent limit had been properly submitted to the taxpayers.

(c) That the question of the issuance of the \$235,000 of Water Works Bonds, of which \$100,000 were to be used for funding bonds, and \$135,000 for the construction of additions to the water supply, was

a double question, and was submitted to the tax-payers of said city as one question, and that the tax-payers affected thereby were never permitted the opportunity of expressing their will upon the two separate questions.

16. That these plaintiffs are corporations engaged [16] in the business of dealing in municipal securities such as those hereinbefore referred to, and in buying such securities and selling them in the open market in various parts of the United States to persons desiring to invest in such securities; that the market for such securities depends entirely upon the validity of the issuance of the securities thus offered for sale, and that the question of their legality depends largely upon the opinion of attorneys of known reputation and learning with reference to such securities, and that without such opinions it is impossible to sell said securities in the open market to advantage; that the value of such securities fluctuates from time to time, and that unless delivery of the securities purchased is made within a short time after the purchase thereof damage is liable to be done to the purchaser by reason of such variation in the market and inability to supply customers, which said damage cannot readily be ascertained or measured by money values; that if said issue of bonds so purchased from said City of Bozeman is legal, the plaintiffs are desirous of receiving the same promptly in order that they may be supplied to their customers; that if the delivery of said bonds is arbitrarily withheld for a length of time these plaintiffs would suffer a loss which could not be adequately

measured or compensated by the payment of money damages; that these plaintiffs bid for both the Water Works and Sewer Bonds as one issue, and the amount of the bonds to be delivered was one of the considerations moving the plaintiffs to bid thereon; that these plaintiffs are willing and ready to accept said bonds if this court decrees the same to be legal and valid outstanding obligations of said City of Bozeman, and offers to pay the purchase price thereof upon the delivery of said bonds [17] properly executed; that the action of said City of Bozeman and the defendants Luce and Spieth as its executive officers, in failing and refusing to commence any proceedings to determine the validity and legality of said bonds or to return to these plaintiffs their certified checks is arbitrary and against good conscience and violative of the rights of these plaintiffs as fixed by the acceptance of their bid for said issue of bonds.

17. That these plaintiffs are advised and believe that the defendants will, unless restrained by order of this Court, sell and deliver said issue of bonds to other persons and cash or negotiate the said certified checks and forfeit the proceeds thereof into the city treasury of the City of Bozeman and thus deprive these plaintiffs of both the delivery of said bonds and the return of said certified checks.

18. That the plaintiffs have no adequate remedy at law in the premises.

WHEREFORE, plaintiffs pray:

1. That this Court may determine whether or not the issue of bonds so sold to these plaintiffs and the proceedings incident thereto are legal and valid.

2. That if the issue of bonds hereinabove described be adjudged to be illegal, that the defendants be ordered and directed by an injunction having the force and effect of a writ of mandamus, to deliver to these plaintiffs the two certified checks of \$2,000 each, drawn on the Interstate Trust Company, of Denver, Colorado, in favor of the defendant City of Bozeman; or if the said checks have been cashed and cannot be returned, that the plaintiffs have judgment against the City of Bozeman for the sum of four thousand dollars (\$4,000), together with interest thereon [18] at the rate of eight per cent per annum from the date said checks were cashed.

3. That if said issue of bonds be adjudged by this Court to be legal outstanding obligations of the City of Bozeman, that a writ of injunction having the force and effect of a writ of mandamus may be issued out of this Honorable Court commanding the defendants John A. Luce and C. A. Spieth, as mayor and city clerk, respectively, of said City of Bozeman, to deliver to these plaintiffs the issue of bonds as described in the said bids, upon these plaintiffs depositing in this court the amount of said bids.

4. That upon the filing of this bill of complaint an order be issued directed to the said defendants and each of them, requiring them to show cause at a time and place to be fixed by this Court why a preliminary writ of injunction should not issue against them, enjoining and restraining them from selling and delivered said issue of bonds to other persons, and from negotiating or cashing said certified checks

so deposited with them.

5. That from time to time such other and further orders, general and specific, may be made by your Honor as will effectuate the object and purposes for which this suit is brought, and that the plaintiffs may have such writs, processes and other aids of the court as may from time to time be found necessary to accomplish said object and purposes.

6. And for all such other, further and general relief as to a court of equity may seem meet in the premises. [19]

SWEET, CAUSEY, FOSTER & COMPANY.

JAMES N. WRIGHT & COMPANY.

C. W. McNEAR & COMPANY.

By E. C. DAY,

THOS. A. MAPES,

Their Solicitors.

JAMES H. PERSHING, Esq.,

FREDERICK S. TITSWORTH, Esq.,

JOHN H. FRY, Esq.,

MYLES P. TALLMADGE, Esq.,

Denver, Colorado,

Of Counsel. [20]

United States of America,

District of Montana,

State of Montana,

County of Lewis and Clark,—ss.

E. C. Day, being first duly sworn, on oath deposes and says: That he is one of the solicitors for the plaintiffs above named; that each of said plaintiffs

is a foreign corporation and has no officer or agent within the State of Montana, wherefore he makes this verification for and on behalf of said plaintiffs and as their said solicitor; that he has read the foregoing bill of complaint and knows the contents thereof, and that the matters therein stated are true to the best of his knowledge, information and belief.

E. C. DAY.

Subscribed and sworn to before me this 14th day of July, 1916.

[Seal]

T. A. MAPES,

Notary Public for the State of Montana, Residing at Helena, Mont.

My commission expires July 24, 1917. [21]

**Exhibit "A" to Bill of Complaint—Council Resolution No. 695.**

**EXHIBIT "A."**

**COUNCIL RESOLUTION No. 695.**

A COUNCIL RESOLUTION PROVIDING FOR THE ISSUANCE OF WATER WORKS BONDS, IN THE SUM OF \$235,000; \$100,000 OF THE PROCEEDS THEREOF TO BE USED IN REDEEMING THE PRESENT OUTSTANDING WATER WORKS BONDS AND THE BALANCE IN EXTENDING, IMPROVING AND ENLARGING THE PRESENT WATER WORKS SYSTEM AND ACQUIRING AN AUXILIARY OR ADDITIONAL WATER WORKS SYSTEM FROM BOZEMAN CREEK FOR THE CITY OF BOZEMAN; AND PROVIDING FOR THE CALLING AND HOLDING OF A SPE-

CIAL ELECTION FOR THE PURPOSE OF SUBMITTING THE QUESTION OF SUCH BOND ISSUE TO THE QUALIFIED ELECTORS.

WHEREAS, the present water works system and water supply of the City of Bozeman in the State of Montana, are inadequate and insufficient for the private and public needs of said City; and

WHEREAS, the necessity of extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system to provide the present and future needs of said City with municipal water, is imperative; and

WHEREAS, an additional supply of water may be obtained from Bozeman Creek; and whereas, there are \$100,000.00 of outstanding Water Works Bonds.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the City of Bozeman issue and sell \$235,000.00 of Water Works Bonds, upon the credit of the City, with coupons attached thereto; \$100,000.00 of the proceeds from the sale thereof to be used in redeeming the present outstanding Water Works Bonds and the balance in extending, improving and enlarging the present water works [22] system and acquiring an auxiliary or additional water works system from Bozeman Creek, for the City of Bozeman.

Section 2. That the City Clerk is hereby directed to give notice, as provided by law, that there will be

submitted to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in the said City of Bozeman, at a special election to be held at the time of the General Spring Election on April 3, 1916, the question of the said City issuing Water Works Bonds upon the credit of the said City in the sum of \$235,000.00, the proceeds from the sale thereof to be used for the purposes aforesaid. At the said election ballots shall be provided in accordance with law and shall contain the words:

“Water Works Bonds”  
“Bonds Yes” and  
“Bonds No.”

and in voting, the elector shall make a cross thus “X” opposite the answer for which he intends to vote. The election shall be conducted and canvassed, and the returns made in the same manner as other City elections.

Section 3. If a majority of the votes cast at said election shall be cast for “Bonds—Yes,” the City Council shall, as soon as practicable thereafter, give notice by advertisement in the “Weekly Courier,” a weekly newspaper published in the City of Bozeman, and also in some newspaper published in the City of New York, for a period not less than four weeks, to the effect that the City of Bozeman will sell the bonds voted at said election, briefly describing them, at public auction at not less than their par value, and shall state the time when and the place where such sale shall take place. [23]

Section 4. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed to sign and execute, after the sale thereof, the said Water Works Bonds to an amount not to exceed the sum of \$235,000.00. The Bonds issued by virtue of this Resolution shall be known as "Water Works Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and July in each year. Said bonds shall have attached semi-annually coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City Clerk; provided a lithographic or an engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only, and it shall be so recited in the bonds. The said bonds shall be consecutively numbered, beginning at number one.

Section 5. A tax of one mill on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof, together with the net proceeds derived from the sale of water by said City, shall be used for the purpose of paying the interest on said bonds so issued, and to create a sinking fund for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the

proper coupons, which shall show the amount due and the number of bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer notice, in [24] writing, that he or they wish the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City, (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 5. The Water Works Bonds, the issuance of which is herein provided for, shall be payable in twenty years and redeemable at the option of the City of Bozeman at any time after ten years, and whenever at any time after ten years from the date of issuance of said bonds, the sum in the sinking fund shall equal or exceed One Thousand Dollars, the said Treasurer shall cause notice to be published in one newspaper in the City of Bozeman, that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, and calling for said bonds in their numerical order. A similar notice shall be given by mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if at the expiration of thirty days, the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treas-

urer shall be ready at all times to redeem said bonds on presentation.

Section 7. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance, prescribe.

Passed February 28, 1916.

Approved February 28, 1916.

JOHN A. LUCE,

Mayor.

[Seal]

Attest: C. A. SPIETH,

City Clerk. [25]

**Exhibit "B" to Bill of Complaint—Council Resolution No. 696.**

**EXHIBIT "B."**

**COUNCIL RESOLUTION No. 696.**

A COUNCIL RESOLUTION PROVIDING FOR THE ISSUANCE OF SEWER BONDS IN THE SUM OF \$70,000; THE PROCEEDS FROM THE SALE THEREOF TO BE USED IN EXTENDING, IMPROVING AND ENLARGING THE SANITARY SEWER AND STORM SYSTEMS OF THE CITY OF BOZEMAN; AND PROVIDING FOR THE CALLING AND HOLDING OF A SPECIAL ELECTION FOR THE PURPOSE OF SUBMITTING THE QUESTION OF SUCH BOND ISSUE TO THE QUALIFIED ELECTORS.

WHEREAS, the present sanitary sewer system and storm sewer system of the City of Bozeman in the State of Montana, are inadequate and insufficient for the private and public needs of said City; and

WHEREAS, the necessity of extending, improving and enlarging the present sanitary sewer system and storm sewer system to meet the present and future needs of said City with proper and adequate sanitary sewer and storm sewer facilities, is imperative;

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the City of Bozeman issue and sell \$70,000.00 of sewer bonds upon the credit of said City, with coupons attached thereto; the proceeds from the sale thereof to be used in extending, improving and enlarging the present sanitary sewer system and storm sewer system of the City of Bozeman.

Section 2. That the City Clerk is hereby directed to give notice as provided by law, that there will be submitted to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in the said City of Bozeman, at a special election to be held at the [26] time of the General Spring Election of April 3, 1916, the question of said City issuing sewer bonds upon the credit of the said City in the sum of \$70,000.00, the proceeds from the sale thereof to be used for the purposes aforesaid. At the said election, ballots shall be provided in accordance with law and shall contain the words:

“Sewer Bonds.”

“Bonds Yes” and

“Bonds No.”

and in voting, the elector shall make a cross thus “X” opposite the answer for which he intends to

vote. The election shall be conducted and canvassed, and the returns made in the same manner as other City elections.

Section 3. If a majority of the votes cast at said election shall be cast for "Bonds—Yes," the City Council shall, as soon as practicable thereafter, give notice by advertisement in the "Weekly Courier," a weekly newspaper published in the City of Bozeman, and also in some newspaper published in the City of New York, for a period of not less than four weeks, to the effect that the City of Bozeman will sell the bonds voted at said election, briefly describing them, at public auction at not less than their par value, and shall state the time and the place where such sale shall take place.

Section 4. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed to sign and execute, after the sale thereof, the said Sewer Bonds to an amount not to exceed the sum of \$70,000.00. The bonds issued by virtue of this Resolution shall be known as "Sewer Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; [27] interest payable semi-annually on the first days of January and of July in each year. Said bonds shall have attached semi-annual coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City Clerk; provided a lithographic or engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only,

and it shall be so recited in the bonds. The said bonds shall be consecutively numbered, beginning at number one.

Section 5. A tax of one and one-half mills on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof shall be used for the purpose of paying the interest on said Bonds as issued, and to create a sinking fund for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the proper coupons, which shall show the amount due and the number of the bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer notice, in writing, that he or they wish the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 6. The Sewer Bonds, the issuance of which is herein provided for shall be payable in twenty years and [28] redeemable at the option of the City of Bozeman at any time after ten years, and whenever at any time after ten years from the

date of issuance of said bonds, the sum in the sinking fund shall equal or exceed One Thousand Dollars, the said Treasurer shall cause notice to be published in one newspaper in the City of Bozeman, that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, and calling for said bonds in their numerical order. A similar notice shall be given by mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if at the expiration of thirty days the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treasurer shall be ready at all times to redeem said bonds on presentation.

Section 7. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance, prescribe.

Passed February 28, 1916.

Approved February 28, 1916.

JOHN A. LUCE,  
Mayor.

[Seal] Attest: C. A. SPIETH,  
City Clerk. [29]

**Exhibit "C" to Bill of Complaint.**

**EXHIBIT "C."**

**ORDINANCE No. 456.**

AN ORDINANCE DIRECTING THE ISSUANCE OF WATER WORKS BONDS OF THE CITY OF BOZEMAN, MONTANA, to the AMOUNT OF \$235,000.00; \$100,000.00 OF THE

PROCEEDS THEREOF TO BE USED IN REDEEMING THE PRESENT OUTSTANDING WATER WORKS BONDS AND THE BALANCE IN EXTENDING, IMPROVING AND ENLARGING THE PRESENT WATER WORKS SYSTEM AND ACQUIRING AN AUXILIARY OR ADDITIONAL WATER WORKS SYSTEM FROM BOZEMAN CREEK FOR THE CITY OF BOZEMAN; AND PROVIDING FOR A TAX TO BE LEVIED EACH YEAR FOR THE PURPOSE OF PAYING THE INTEREST ON SUCH BONDS AND TO CREATE A SINKING FUND FOR THEIR REDEMPTION.

WHEREAS, the City Council of the City of Bozeman, at a special meeting held on February 28, 1916, duly and regularly passed Council Resolution No. 695 entitled "A Council Resolution Providing for the Issuance of Water Works Bonds, in the sum of \$235,000.00; \$100,000.00 of the Proceeds thereof to be Used in Redeeming the Present Outstanding Water Works Bonds and the Balance in Extending, Improving and Enlarging the Present Water Works System and Acquiring an Auxiliary or Additional Water Works System from Bozeman Creek for the City of Bozeman; and Providing for the Calling and Holding of a Special Election for the Purpose of Submitting the Question of Such Bond Issue to the Qualified Electors," and

WHEREAS, the City Council of said City in said Council Resolution No. 695, ordered that a special election be held in the City of Bozeman, Montana, on the 3d day of April, 1916, and the City Clerk

of said City was authorized and directed to give notice thereof as provided by law for the purpose of submitting to the taxpayers of said City of Bozeman, as defined by Sections 468 and 469 of the Revised [30] Codes of Montana of 1907, who were also possessed of the qualifications of electors in the said City of Bozeman, the question of the said City of Bozeman issuing waterworks bonds upon the credit of the said city in the sum of \$235,000.00, the proceeds from the sale thereof to be used in redeeming the present outstanding waterworks bonds and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman; and

WHEREAS, at the said special meeting of the said City Council, held on the 28th day of February, 1916, a registry agent was appointed to register the taxpayers of said city, qualified to vote at the said special election to be held on the said 3d day of April, 1916, on the question of the issuance of the said water works bonds, who thereafter gave due notice of registration and duly and regularly registered the names of the taxpayers qualified to vote at said special election, in accordance with the provisions of Ordinance No. 140 of said city, in so far as the same relates to registration for special city elections; and

WHEREAS, a special election was duly noticed and held on the 3d day of April, 1916, in said City of Bozeman, as provided in said Council Resolution No. 695, calling the same, and as provided by law for holding special municipal elections; and

WHEREAS, at an adjourned regular meeting of the City Council of the said city, held on the 7th day of April, 1916, the vote at said special election was duly and regularly canvassed and it was ascertained and determined that at said election 224 votes were cast in favor of the issuance of said water bonds and 132 votes were cast against [31] the issuance of said bonds, and there being a majority in favor of the issuance of said bonds of 92 votes, the question of the issuance of such water works bonds was declared carried; and

WHEREAS, at said meeting of said City Council, held on April 7, 1916, the said City Council appointed May 18, 1916, at seven thirty o'clock P. M., at the Council Chamber in the City Hall Building in the said City of Bozeman, as the time when and the place where the issue of \$235,000.00 of water works bonds of said City would be offered for sale at public auction, and directed the City Clerk to give notice of such sale by advertising in the "Weekly Courier," a weekly newspaper, published in the said City of Bozeman, and in the "Financier," a weekly newspaper published in New York City, for a period of four weeks before May 18, 1916.

. NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the water works bonds of the City of Bozeman, State of Montana, to an amount not to exceed \$235,000.00 be issued upon the sale thereof by the City in pursuance of such sale, for the purpose of redeeming the present outstanding water

works bonds in the sum of \$100,000 and the balance to be used in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman.

Section 2. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed to sign and execute, after the sale thereof, the said Water Works Bonds to an amount not to exceed \$235,000. The bonds issued by virtue of this Ordinance shall be known as [32] "Water Works Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and of July in each year. Said bonds shall have attached semi-annual coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City Clerk; provided a lithographic or engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only, and it shall be so recited in the bonds. The said bonds shall be consecutively numbered, beginning at number one.

Section 3. A tax of one mill on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof, together with the net proceeds derived from the sale of water by said City, shall be used for the purpose of paying the interest on said bonds so issued, and to create a sinking fund

for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the proper coupons, which shall show the amount due and the number of the bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer notice, in writing, that he or they wish the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall [33] be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 4. The Water Works Bonds, the issuance of which is herein provided for, shall be payable in twenty years and redeemable at the option of the City of Bozeman at any time after ten years, and whenever at any time after ten years from the date of issuance of said bonds, the sum in the sinking fund shall equal or exceed one thousand dollars, the said Treasurer shall cause notice to be published in one newspaper in the City of Bozeman that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, and calling for the said bonds in their numerical order. A similar notice shall be given by

mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if, at the expiration of thirty days, the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treasurer shall be ready at all times to redeem said bonds on presentation.

Section 5. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance prescribe.

Section 6. That this Ordinance shall take effect and be in full force from and after its passage, approval and publication.

Passed this 7th day of April, 1916.

Approved this 7th day of April, 1916.

JOHN A. LUCE,

Mayor.

[Seal]

Attest: C. A. SPIETH,  
City Clerk. [34]

**Exhibit "D" to Bill of Complaint.**

**EXHIBIT "D."**

**ORDINANCE No. 457.**

AN ORDINANCE DIRECTING THE ISSUANCE OF SEWER BONDS OF THE CITY OF BOZEMAN, MONTANA, TO THE AMOUNT OF \$70,000; THE PROCEEDS FROM THE SALE THEREOF TO BE USED IN EXTENDING, IMPROVING AND ENLARGING THE SANITARY AND STORM SEWER SYSTEMS OF THE CITY OF BOZEMAN; AND PROVIDING FOR A TAX TO BE LEVIED EACH YEAR FOR THE PUR-

POSE OF PAYING THE INTEREST ON SUCH BONDS AND TO CREATE A SINKING FUND FOR THEIR REDEMPTION.

WHEREAS, the City Council of the City of Bozeman, at a special meeting held on February 28, 1916, duly and regularly passed Council Resolution No. 696 entitled "A Council Resolution Providing for the Issuance of Sewer Bonds in the Sum of \$70,000; the Proceeds from the Sale Thereof to be Used in Extending, Improving and Enlarging the Sanitary Sewer and Storm Sewer Systems of the City of Bozeman; and Providing for the calling and holding of a Special Election for the Purpose of Submitting the Question of such Bond Issue to the Qualified Electors"; and

WHEREAS, the City Council of said City in said Council Resolution No. 696, ordered that a special election be held in the City of Bozeman, Montana, on the 3d day of April, 1916, and the City Clerk of said City was authorized and directed to give notice thereof as provided by law for the purpose of submitting to the taxpayers of said City of Bozeman, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who were also possessed of the qualifications of electors in the said City of Bozeman, the question of the said City of Bozeman issuing sewer bonds upon the credit of the said City in the sum of \$70,000, the proceeds from the sale thereof to be used [35] in extending, improving and enlarging the present sanitary sewer systems and storm sewer system of the City of Bozeman; and

WHEREAS, at the said special meeting of the

said City Council, held on the 28th day of February, 1916, a registry agent was appointed to register the taxpayers of said City, qualified to vote at the said special election to be held on the 3d day of April, 1916, on the question of the issuance of the said Sewer Bonds, who thereafter gave due notice of the registration and duly and regularly registered the names of the taxpayers qualified to vote at said special election, in accordance with the provisions of Ordinance No. 140 of said City, in so far as the same relates to registration for Special City Election; and

WHEREAS, a special election was duly noticed and held on the 3d day of April, 1916, in said City of Bozeman, as provided in said Council Resolution No. 696 calling the same, and as provided by law for holding special municipal elections; and

WHEREAS, at an adjourned regular meeting of the City Council of said City, held on the 7th day of April, 1916, the vote at said special election was duly and regularly canvassed and it was ascertained and determined that at said election, 239 votes were cast in favor of the issuance of said sewer bonds and 116 votes were cast against the issuance of said sewer bonds, and there being a majority in favor of the issuance of said bonds of 123 votes, the question of the issuance of such sewer bonds was declared carried; and

WHEREAS, at said meeting of said City Council held on April 7, 1916, the said City Council appointed May 18, 1916, at seven thirty o'clock P. M., at the Council [36] Chamber in the City Hall Building in the said City of Bozeman, as the time when and

the place where the issue of \$70,000 of sewer bonds would be offered for sale at public auction, and directed the City Clerk to give notice of such sale by advertising in the "Weekly Courier," a weekly newspaper published in the said City of Bozeman, and in the "Financier," a weekly newspaper published in New York City, for a period of four weeks before May 18, 1916.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BOZEMAN, MONTANA:

Section 1. That the sewer bonds of the City of Bozeman, State of Montana, to an amount not to exceed \$70,000, be issued upon the sale thereof by the City in pursuance of such sale, for the purpose of extending, improving and enlarging the present sanitary sewer system and storm sewer system of the City of Bozeman.

Section 2. That the Mayor and City Clerk of the City of Bozeman are hereby authorized and instructed and sign and execute, after the sale thereof, the said Sewer Bonds to an amount not to exceed the sum of \$70,000. The bonds issued by virtue of this Ordinance shall be known as "Sewer Bonds"; shall be dated July 1, 1916; shall be of the denomination of One Thousand Dollars each and shall bear interest at a rate not exceeding five per cent per annum; interest payable semi-annually on the first days of January and of July in each year. Said bonds shall have attached semi-annual coupon notes for each installment of interest, and the bonds and coupons attached thereto shall be signed by the Mayor and City

Clerk; provided a lithographic or engraved facsimile of the signatures of the Mayor and City Clerk may be affixed to the coupons only, and it shall be so recited in the bonds. The said bonds [37] shall be consecutively numbered, beginning at number one.

Section 3. A tax of one and one-half mills on the dollar shall be levied each year upon the taxable property in said City and the proceeds thereof shall be used for the purpose of paying the interest on said bonds as issued, and to create a sinking fund for their redemption, until the same are paid in full and redeemed.

The City Treasurer shall pay in lawful money of the United States on the first day of January and the first day of July in each year, the interest due on such bonds upon the presentation at his office of the proper coupons, which shall show the amount due and the number of the bonds to which they severally belong; but in case the holder or holders of such bonds shall give the Treasurer, notice, in writing, that he or they with the bonds so held by them and the interest to be paid in New York City, then such bonds and coupons shall be payable in New York City, (at such bank as shall be designated by the City Treasurer), and all bonds and coupons so paid shall be returned to the City Council at the next monthly meeting and said bonds and coupons shall be cancelled in the manner in which City Warrants are now cancelled.

Section 4. The Sewer Bonds, the issuance of which is herein provided for shall be payable in twenty years and redeemable at the option of the

City of Bozeman at any time after ten years, and whenever at any time after ten years from the date of issuance of said bonds, the sum in the sinking fund shall equal or exceed One Thousand Dollars, the said treasurer shall cause notice to be published in one newspaper in the City of Bozeman, that he will within thirty days from the date of such notice, redeem said amount of bonds, giving the number thereof, [38] and calling for said bonds in their numerical order. A similar notice shall be given by mail to such bank in the City of New York as the City Treasurer has designated as the bank at which said bonds and interest thereon will be paid; and if at the expiration of thirty days, the holder or holders of said bonds shall fail or neglect to present the same for payment, interest shall cease and the Treasurer shall be ready at all times to redeem said bonds on presentation.

Section 5. That the said bonds shall be in such form as the City Council of the City of Bozeman shall hereafter by Ordinance prescribe.

Section 6. That this Ordinance shall take effect and be in force from and after its passage, approval and publication.

Passed this 7th day of April, 1916.

Approved this 7th day of April, 1916.

JOHN A. LUCE,  
Mayor.

[Seal] Attest: C. A. SPIETH,  
City Clerk. [39]

**Exhibit "E" to Bill of Complaint.****EXHIBIT "E."****FINANCIAL STATEMENT.**

Issued by the City of Bozeman, Gallatin County, Montana, at close of business, March 31, 1916.

Date of sale to be determined. Manner of sale—advertised auction.

Total amount of this issue, \$70,000.00 Check required, to be determined later.

Purpose of issue, extending, improving and enlarging present sanitary sewer system and storm sewer system of the City of Bozeman.

Bonds are a direct obligation of entire municipality.

Date of bonds, July 1, 1916. Due July, 1936.

Optional, July 1, 1926.

Rate not over 5%. Denomination, \$1000. Interest semi-annual.

Interest payable January 1st and July 1st.

Principal and interest payable at office of City Treasurer and such New York bank as he may designate.

To be voted April 3, 1916.

**ITEMIZED STATEMENT OF BONDS PREVIOUSLY ISSUED AND NOW OUTSTANDING.**

Bonds issued for Water, 5%, due Jan.

1919 ..... \$100,000.00

Bonds issued for City Hall Funding, 4%,

due Jan. 1921..... 21,000.00

Bonds issued for Warrant Funding, 5%, due Jan. 1934, optional July, 1924.....	155,000.00
Bonds issued for All Imp. Districts Floating .....	975.00
Total indebtedness including this issue, but not \$135,000.00 additional Water Bonds to be voted on April 3, 1916....	\$644,361.13
[40]	
Cash value of sinking funds on hand applicable to the redemption of the above bonds .....	\$ 6,172.38
Improvement District Funds.....	2,311.84
All Other Funds.....	11,771.69
Total.....	\$20,255.91

True value of real estate and personal property (estimated) .....\$10,000,000.00  
Assessed value of real estate and personal property, equalized 1915  
(33 $\frac{1}{3}$ %) ..... 3,209,196.00  
Population, Census, 1890, 2143; Census, 1900, 3419;  
Census 1910, 5107; Present estimated, 7500.

City incorporated, 1883.

No previous issues of bonds have been contested.  
Principal and interest of all bonds previously issued have always been promptly paid at maturity.

There is no controversy or litigation pending or threatened affecting the corporate existence or the boundaries of the said municipality or the title of its present officials to their respective offices, or the validity of its bonds.

Issue authorized by special Election.

The proceeds of these bonds will not be used directly or indirectly for any other purpose than that above stated.

Dated at Bozeman, Montana, this 1st day of April, 1916.

C. A. SPIETH,  
City Clerk.

[Endorsed]: Title of Court and Cause. Bill of Complaint. Filed July 14, 1916. Geo. W. Sproule, Clerk. [41]

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Thereafter, on July 20, 1916, Answer was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Answer to Plaintiffs' Bill of Complaint.**

Come now the above-named defendants, and not waiving any objections to the Bill of Complaint or to the sufficiency thereof, to state a cause of action against the defendants, or either of them and insisting on the insufficiency thereof, and for their joint and several answer to the Bill of Complaint of plaintiff, admit, deny and allege as follows, to wit:

1. They admit the allegations of paragraph 1 and 2 of said Bill of Complaint.
2. They admit that this is a suit in equity; and admit that the matter in controversy exceeds the sum of Three Thousand Dollars (\$3,000).
3. Admit the allegations of paragraphs 4, 5, 6, 7, 8, 9, and 10 of said Bill of Complaint.
4. They admit that in pursuance of said notice,

dated April 12, 1916, as the same appears on pages 6 and 7 of said Bill of Complaint, the plaintiffs applied to and received from the City Clerk of the said City of Bozeman, a financial statement, dated, April 1, 1916, a copy of which is attached to said Bill of Complaint, marked Exhibit "E"; and they further allege that in addition to said financial statement, the plaintiffs demanded and received, at least two weeks before the 18th day of May, 1916, a true, full and correct transcript of all of the proceedings pertaining to each of said bond issues and financial statements attached to each thereof, similar to said Exhibit "E," [42] and that on the 18th day of May, 1916, and prior to the time of the bidding by them for said bonds, the plaintiffs were fully advised of all of the proceedings of the said City Council of the City of Bozeman, regarding said bond issues and as to the financial condition of the said city and as to the legality of all of the proceedings regarding said bond issues; and that the said plaintiffs made the bid for the said bonds and entered into the agreement of the 18th day of May, 1916, with full knowledge and information regarding all of the proceedings had and done with regard to the submission of said question of the issuance of said bonds to the vote of the duly qualified electors and taxpayers of the City of Bozeman. And the defendants further allege that the plaintiffs made said bid with due notice from the defendants that no bid was desired from any person or corporation, if they had any doubt of the validity of the said bonds, which notice was given by the defendant, John A. Luce, as the

Mayor of said city, at the said meeting of the said City Council on the 18th day of May, 1916. In addition to the notice mentioned and set forth in paragraph 12 of said Bill of Complaint, the allegations of which, the defendants admit, the defendants aver that for the reasons aforesaid, the plaintiffs are in equity and good conscience, estopped from now claiming that said bonds are, or ever were illegal, for the reasons stated in said Bill of Complaint or for any other reason whatever.

5. They admit that on the 26th day of May, 1916, the said City of Bozeman, acting through its Mayor, the defendant, John A. Luce, submitted to the plaintiffs, certified transcripts of all proceedings relating to the issuance of said bonds, and that plaintiffs received the same at the City [43] of Denver, on or about the 27th day of May, A. D. 1916, and that they submitted the question of the legality of the said issues of bonds to said Pershing, Titsworth and Fry, and admit that an opinion was rendered by said attorneys that the issue of said bonds was illegal as claimed, for two reasons. First. That they created an indebtedness in excess of the constitutional limit of indebtedness as prescribed by the Constitution of the State of Montana. Second. Because the question of the refunding bonds and the new bonds for the purpose of creating an additional water supply was a double question and had been submitted as one question to the taxpayers affected thereby and said attorneys claim that said taxpayers had not been afforded an opportunity to vote upon the question of the issuing of new water bonds as a separate

proposition ; but these defendants deny that the issuance of said bonds would in any way exceed the constitutional limit of indebtedness of the said City of Bozeman, but aver that they are less than the amount authorized by the Constitution and Laws of the State of Montana, and they deny that there was any double question submitted to the said taxpayers of the said City of Bozeman on either of the said bond issues and deny that the said bonds are now or ever have been illegal, and the defendants aver that the legal and outstanding indebtedness of the said City of Bozeman, for general purposes under the three per cent limitation of the Constitution and Laws of the State of Montana, did not at the time of the sale of said bonds, and does not now exceed \$96,279.88, to wit : That the said legal, outstanding indebtedness for general purposes did not exceed three per cent of the assessed valuation of the City of Bozeman, all of which plaintiffs well knew at the time said contract was entered into. The defendants [44] further allege that the total indebtedness of the said City of Bozeman, for water and sewer purposes, including the proposed bond issues, does not and will not after such issuance exceed ten per cent of the assessed valuation of the taxable property in the said City of Bozeman, as it appears upon the last assessment-roll of the County of Gallatin, State of Montana.

6. The defendants admit that on the 9th day of June, 1916, the plaintiffs through the plaintiffs, Sweet, Causey, Foster and Company, notified the defendant, John A. Luce as Mayor of the City of Bozeman, that their attorneys had rendered an opinion

declining to approve the legality of said bonds, by telegram reading in the words and figures as follows, to wit:

“Denver, Colo., June 8, 1916, 1:51 P. M.

**John A. Luce, Mayor,**

Bozeman, Mt.

Attorney’s opinion declining to approve legality of Bozeman Bonds. Our Mr. Phillips will be in Bozeman, Saturday, with copy of opinion to talk situation over with you.

**SWEET, CAUSEY, FOSTER & COMPANY.”**

And these defendants allege that the plaintiffs had, prior to said time, repudiated said Contract and prior to the receipt of said transcript from the defendant, John A. Luce, had telegraphed to the defendant, C. A. Spieth, a night letter as follows, to wit:

“Just received from Torrence contract which he purported to sign on behalf of our associates and ourselves for purchase of your bonds. He had no authority to bid except strictly subject to the approval of our attorneys as to the legality of the bonds proposed to be issued. This is the only way in which we bid for bonds. We are willing to let the bid stand as ours subject to the approving opinion of our attorneys as to the legality of the issues which opinion shall be conclusive, but we absolutely cannot assume the further responsibility of otherwise establishing illegality if our attorneys should decline to approve legality of bond issues. If you are willing to accept this condition let us know, and forward certified transcripts for examination, otherwise

please return to us our certified checks." [45]

7. These defendants admit that on the 20th day of June, 1916, and at divers other times, the plaintiffs have demanded of the defendants, the return of the said certified checks; but they deny that they have ever demanded compliance with the provisions of said contract, or ever tendered any blank bonds for signing or that the plaintiffs, or either of them at any time, offered to take said bonds and pay for the same or to otherwise comply with the said contract upon their part; but they admit that on or about the 21st day of June, 1916, the said plaintiffs, through said Sweet, Causey, Foster and Company, served a notice upon the defendants, in the words and figures following, to wit:

"June 21, 1916.

The Mayor and City Council of Bozeman,

c/o C. A. Spieth, City Clerk,

Bozeman, Montana.

Gentlemen :

Heretofore you have been notified that Mr. L. E. Torrence did not have any authority to make a contract on behalf of this company, and its associates, such as was purported to be entered into by him on the 18th day of May, 1916.

You have also been notified that the \$235,000.00 bond issues offered for sale by you at public auction were in fact illegal, and the return to us of the amount of our certified checks in the sum of \$4,000.00 has been demanded. Without waiving any of our rights under the action we have taken, we desire to call

your attention to the fact that the said purported contract contains this language:

'The party of the first part agrees to promptly take such steps to make these issues legal as may be required and deemed necessary by the attorneys of the parties of the second part, \* \* \* to promptly furnish them with evidence of the legality of the issue in form satisfactory to their attorneys.'

Enclosed you will find a letter from our attorneys stating what will be necessary in order to make these bond issues legal. Kindly notify us at once whether or not you are willing to comply with their demands, and oblige

Yours very truly,

SWEET, CAUSEY, FOSTER & COMPANY,  
By C. L. PHILLIPS." [46]

That said opinion of Pershing, Titsworth and Fry, being the attorneys mentioned in said letter of June 21, 1916, was as follows, to wit:

"June 20, 1916.

Sweet, Causey, Foster & Company,  
Equitable Bldg.,  
Denver, Colorado.

Gentlemen:

In re proposed \$305,000 Bond Issues by the City of Bozeman, Montana.

In reply to your verbal inquiry as to whether or not under any circumstances the City of Bozeman, Montana, could legally issue bonds at this time to the extent above mentioned, we wish to say.

As we understand the proposition, the City of Boze-

man intends to make three issues of bonds. The first issue being for \$100,000.00, denominated 'REFUNDING CITY BONDS,' the second for \$70,000.00, denominated 'SEWER BONDS,' and the third for \$135,000.00, denominated 'WATER WORKS BONDS.'

As a first objection to the issuance of the total amount of bonds above set forth, it appears from the records submitted by the City Clerk of the City of Bozeman, that the assessed valuation of the said City as equalized in 1915 was \$3,209,196. Upon the issuance of these bonds the total outstanding indebtedness of the City, exclusive of the indebtedness for improvement districts, would amount to \$475,030.93, after excluding the amount of improvement district funds on hand and deducting the cash value of sinking funds, and all other funds except improvement district funds. The City cannot under any circumstances incur indebtedness in excess of thirteen (13) per cent of its assessed valuation. The issuance of these bonds, then, would cause the City to become indebted, after deduction of cash on hand, in the sum of \$57,835.45 over and above the thirteen per cent limit. Therefore, the total amount of these bonds cannot be issued until the City has reduced its indebtedness so that the total amount of its indebtedness at the time of the issuance of these bonds will not exceed the constitutional and statutory limitations. Unless that can be done promptly, there is no way in which the total amount of these bonds can be legally issued. If by any means the indebtedness can be reduced, then the following things will have

to be done before legal bonds could be issued. In naming these things we will take up each issue separately.

With reference to the Refunding Bonds.

The City Council has authority to issue these refunding bonds without an election, but before they do so it is necessary that two conditions exist. These conditions are set out in Section 3464 of the Revised Code of Montana of 1907, Volume 1. They are as follows: [47]

- ‘1. When there is not sufficient money to the credit of said City or town applicable to pay any of said bonds.
2. When in the judgment of the City or town Council to levy and collect a tax for the paying of any of said bonds would be a hardship and a burden to said City or town.’

Nothing in the proceedings submitted indicate that these conditions exist. Therefore, either the ordinances authorizing the issuance of these bonds or some preliminary resolution or ordinance should be adopted finding and declaring that such conditions do exist. If the conditions do exist and Council so finds them, the outstanding \$100,000.00 in water bonds could be refunded by an Ordinance, the ordinance containing the proper recitals, and making a provision for the issuance of the bonds, their sale and the fixing of a tax to be levied each year for the payment of the interest thereon and the creating of a sinking fund for the payment of the principal thereof. The tax so fixed, however, should be sufficient for the purpose. After such ordinance was

passed, the bonds should be advertised for sale, offered to the State Land Board, etc., in accordance with the statutes.

Second, with reference to the Water Works Bonds.

It would be necessary to call a new election at which the question of the issuing of such bonds, and such bonds alone, should be voted upon. This election to be called either by resolution or ordinance. After the election is held in the manner provided by the statute, if a sufficient number of voters vote in favor of the issuance of the bonds, then an ordinance authorizing their issuance should be passed, which ordinance should contain the form of the bond, provide for their sale, and also fix a tax to be levied each years sufficient to pay the interest and principal thereof, which ordinance should also pledge for the payment of these bonds the net revenues of the water works system, as provided in the constitution and statutes of Montana. The bonds should be offered to the State Land Board, and advertised for sale in the manner prescribed by the City Council.

Third, with reference to the Sewer Bonds.

These bonds might be legally issued as they stand if the other bonds are not issued by amending the ordinance providing for the issuance so as to make a sufficient levy for the payment of the interest and creating a sinking fund to pay the principal, together with proof that they have been offered to the state land board and the county attorney's opinion rendered as to their validity.

We have not gone into all the details of procedure with reference to this matter, but enough to point

out the essential things that will have to be done. If it is desired that we prepare proper proceedings, we can do so, but it would be useless to do so until the present indebtedness of the town is decreased so that the total indebtedness including the bonds proposed to be issued would come within the constitutional and statutory debt limits of Montana.

Yours very truly,

PERSHING, TITSWORTH and FRY." [48]

And the defendants aver that the said letter and opinion of said Pershing, Titsworth and Fry constitute the only demand ever made upon any of the defendants looking towards the curing of any pretended illegality of said bonds; and the defendants aver that the same was not made in good faith, but was a demand that the City pay off \$57,835.45 of indebtedness, which the defendant, the City of Bozeman, could not do and the plaintiff should have known could not have been done and the said demand contemplated an entire new proceeding for the issuance of the bonds and was in no way or manner, a demand for correcting any illegality of the proceedings for the issuance of the bonds in question.

8. The defendants admit that through the officers of the City of Bozeman, they have attempted to collect the money upon said certified checks; but that the plaintiffs, wrongfully and unlawfully stopped payment upon the same, and the said checks have not been paid. They deny that the defendant, the City of Bozeman, or the defendants, Luce or Spieth, or any officers of said City have ever refused to issue to the plaintiffs the bonds purchased by plaintiff; but

they aver that the plaintiffs have never at any time in any way or manner complied with any of the terms of said contract upon their part to be kept and performed.

9. The defendants admit that plaintiffs have been advised by their attorneys that said proposed issues of bonds are illegal, but they deny that the same or any of them are illegal, for the reasons as set forth in said Bill of Complaint, or at all.

10. They admit that plaintiffs are engaged in the business of dealing in municipal securities such as those involved herein and in buying and selling such securities in the open market in the various parts of the United States, [49] to persons desiring to invest in such securities; but they deny that the question of legality of the said bonds depends upon the opinion of any attorney, or that the opinion of any attorney can in any manner affect the validity of the same.

11. They admit that the value of such securities fluctuates from time to time, and they admit that damage may arise to purchasers of securities by reason of the fluctuation in prices, if delivery is not had within a reasonable time and by reason of the variation in the market. But they deny that such damage cannot readily and easily be ascertained or measured by money values; and they aver that the plaintiffs have a plain, speedy and adequate remedy at law for all of the wrongs complained of in said Bill of Complaint.

12. They deny that said bonds have been withheld from plaintiff except only for the wrongful and un-

lawful attempt of the plaintiffs to repudiate said contract and to pretend to claim that said bonds are illegal; and aver that if the plaintiffs have suffered any loss or damage whatever, which the defendants deny, by reason of not receiving the said bonds, the same was caused by the plaintiffs themselves, and not by any act of the defendants.

13. Admit that the plaintiffs bid for the water and sewer bonds as one issue; but deny that the plaintiffs are or ever have been willing to accept said bonds and the defendants aver that at no time have the plaintiffs ever prior to the bringing of this suit offered to take said bonds, but that they have continually, as herein set forth, attempted to repudiate said contract and obtain the return of said checks.

14. They deny that the defendants were under any obligations to institute proceedings to determine the validity or legality of said bonds; but they aver that the defendant, John A. Luce, as Mayor of said City, offered to bring an action to [50] test the validity of said bonds if the plaintiffs would accept the decision of the Court as final and accept and pay for said bonds; and that the plaintiffs refused the said offer, which was made prior to the 21st day of June, 1916; and the defendants further admit that after the repeated demands and notices of the plaintiffs, repudiating said contract, claiming the illegality of said bonds and demanding the return of said checks and after the notice of June 21, 1916, demanding conditions impossible of fulfillment by the said City of Bozeman, the said City of Bozeman has sold said bonds to the Harris Trust and Savings Bank

of Chicago, Illinois, and said bonds have been printed, and will be signed and delivered and accepted by said Harris Trust and Savings Bank, as legal upon the proceedings claimed to be illegal by the plaintiffs herein.

15. And the defendants deny each and every allegation in said Bill of Complaint not herein specifically admitted or denied.

And the defendants further answering said Bill of Complaint, aver:

1. That the said bill does not state a cause that entitles them or either of them to the relief or any of the relief as therein sought and prayed for from and against these defendants or either of them.

2. That the said bill is deficient in certainty and is uncertain in this, to wit:

That it cannot be ascertained from the allegations of said bill, whether the plaintiffs insist and rely upon the illegality and invalidity of the bonds mentioned and described in said bill and in the contract between the plaintiffs and defendants, [51] City of Bozeman, copied on pages six and seven of said bill, or whether the plaintiffs claim that said bonds are valid; that it cannot be ascertained from the allegations of said bill whether the plaintiffs are seeking to recover of the defendants and particularly of the City of Bozeman, said two certified checks, because of the illegality of the said bonds, or whether the plaintiffs are attempting to enforce specific performance of the said contract between the City of Bozeman and the plaintiffs, because of the legality of the said bonds, or whether the plaintiffs are attempting to

enjoin the defendants from the sale and delivery of illegal bonds to others than the plaintiffs, or whether the plaintiffs are attempting to enjoin the defendants from negotiating said checks because of the illegality of said bonds; it cannot be ascertained therefrom whether the plaintiffs are seeking to specifically enforce said contract and to compel the defendants to deliver to them the bonds mentioned therein, or whether they are attempting to cancel said contract and to recover said checks, or the amount thereof, deposited with the City Clerk at the time of entering into the contract to purchase the said bonds.

3. That the plaintiffs did not in their bill, offer to do equity; but on the contrary are taking inconsistent and irreconcilable positions with regard to the said bonds mentioned in the contract between plaintiffs and the defendant, the City of Bozeman.

4. That the said bill is exhibited against these defendants for several and distinct and independent matters and causes, which have no relation to each other and in which, [52] and the greater part of which the defendants, Luce and Spieth are in no way interested and concerned and ought not to be implicated.

5. That two independent and distinct causes of action are joined in the said bill, which are wholly inconsistent in this: That the plaintiffs claim that the said bonds are illegal and seek to recover the said checks, or the amounts thereof from the defendants, and are also seeking to enjoin the defendants from disposing of said bonds, so claimed to be illegal and

for a decree of specific performance of said contract. One of the said causes of action being an action at law and the other an action in equity.

And the defendants further answering allege:

1. That the City of Bozeman is a municipal corporation as alleged in said Bill of Complaint and admitted in this answer.

2. That the water supply of said City is deficient and that there is great danger unless the said deficiency shall be speedily supplied to the citizens of Bozeman; that great and irreparable damage and injury will be caused to the property and the residents and taxpayers of the said City and the Agricultural College of the University of the State of Montana, situated in said City of Bozeman, by reason of fire and also by reason of the lack of water supply during the season of irrigation for the lawns and for domestic purposes upon the higher grounds of said City.

3. That the sewage system of said City is inadequate and it is necessary for the speedy extension of the sewers to provide for proper disposal of the sewage of said City.

4. That the said \$100,000 of outstanding water bonds bear interest payable semi-annually and that it became and [53] was necessary in order to refund said bonds to call the same on the 1st day of July, A. D. 1916, when the interest became due, otherwise the City of Bozeman would lose six months' interest upon said bonds, which could only be redeemed on the 1st of July or the 1st of January in any year.

5. That the season in which work upon the water

and sewer systems proposed to be extended and improved in the City of Bozeman, and for which said bond issues were made, is extremely short, and that the plaintiffs, at the time of said telegram regarding the illegality of said contract, was notified by the defendant, the City of Bozeman, through its Mayor, the defendant, John A. Luce, on the 25th day of May, 1916, by telegram and by letter of the facts aforesaid, which letter containing a copy of said telegram was as follows:

“May 25, 1916.

Sweet, Causey, Foster & Co.,  
Denver, Colorado.

Dear Sirs:

Yesterday I arrived home from Billings where I was attending a meeting of the Executive Committee of the Municipal League of Montana Cities. Mr. Spieth, the City Clerk, presented your telegram to me last night and I do not quite understand your position. Have just wired you as follows:

“Your telegram regarding bonds purchased at hand. Feel assured every proceeding legal. Time is short. Bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity, if claimed, must be shown by purchaser. Council considered your bid best and no provision of contract will be waived. Am sending by express complete transcripts except final adoption of ordinances which will be adopted June first in forms as they appear in transcripts. Minutes of May 18th and 22nd are correct, merely lack final approval on

June first. Feel sure a good attorney will find no illegality. Am writing. Yours very truly,  
City of Bozeman, by John A. Luce, Mayor.'

The proceedings in the matter of the bond issue have all been carefully prepared and scrutinized by Mr. Harry D. Kremer, city attorney, and myself.

I have practiced law thirty years in Montana and we were careful to make these elections and bond issues in [54] every respect according to law. It was the purpose of the City in furnishing transcripts of proceedings prior to sale so that the question you injected into the matter could not exist. In other words, we expected prospective bidders to satisfy themselves of the proceedings before the bids were made. One bond company who bid within \$10 of the price bid by your representative showed to our City Attorney the opinion of Woods & Oakley, eminent bond attorneys of Chicago, as to the validity of the proceedings up to that time. With these facts before me I notified all prospective bidders before the sale that two weeks would be allowed for examination of the proceedings, and if invalidity was claimed, the invalidity must be established by the purchaser. All bidders bid with this distinct understanding, and the contract was drawn and signed by Mr. L. E. Torrence for you and your associates.

The City does not expect any one to take illegal bonds, but on the contrary, the City will not allow this bond issue to be held up by the mere whimsical opinion of any attorney, especially as the bids were made with the distinct understanding as above set forth.

I am sure if the bonds had been sold to the Harris Trust and Savings Bank, no contention such as you make would have arisen, and there was only \$5.00 difference on the bids on each issue.

The Council, relying upon your bid, which we deemed bona fide, and upon your contract as signed, has ordered the City Treasurer to call the one hundred thousand dollars worth of outstanding water works bonds which are to be paid off out of the \$235,000 of water works bonds sold. The call is for July 1, 1916.

It is also vitally necessary that work on the sewer and water works should not be delayed. The Council has already received bids for a large portion of this work. The season here is short and delay in the final consummation of this purchase by you will damage the City immensely under these circumstances. The City must positively decline to return any checks to you or to modify the contract in any way. I presume that you and your associates really desire the bonds and feel that you are raising a question now, which will not arise after you have examined the proceedings.

We are sending to you full transcripts of all proceedings except only the final passage of the ordinances prescribing forms of the bonds. These ordinances have been introduced in the Council, read and referred to the Judiciary Committee and will be passed and approved June 1, 1916, in the form as set forth in the transcripts and on that date will receive my signature and the signature of Mr. Carl A. Spieth, City Clerk.

In fact, the forms of these Ordinances were upon the table when the bonds were sold and bidders were asked to go forward and inspect the same. Mr. L. E. Torrence was furnished with complete copies of the proposed ordinances immediately after the sale on May 18th and he was requested to forward the same to you. The officers of the City know nothing about any custom of your company, or any reservations that you may have intended to make, but the announcement of what the City expected was made to all bidders and clearly understood when your bid was accepted. [55]

Officers of the City had knowledge that Mr. Torrence has represented you in many bond sales in Montana for some time past. Furthermore, the certified checks filed by him were made to you and by your cashier endorsed to Mr. Torrence personally.

It is apparent that you could not possibly question Mr. Torrence's agency in this particular matter.

However, I am sure that when the transcripts are examined any question that you may now have will be dispelled and that the bonds will be taken by you under the contract.

After your attorneys have examined and passed upon the transcripts, you will probably desire that the signatures be inserted approving the ordinances, and also that the approval of the Minutes of May 18th and May 22nd shall be inserted, and also a transcript of the Minutes of June 1, 1916, regarding the passage of these ordinances.

These will be made and affixed to the transcript and returned to you, as soon after the transcripts

are received as they can be prepared and attached.

If your attorneys claim any illegality in the proceedings, kindly return the transcripts to Mr. Carl A. Spieth, City Clerk, at once, pointing out any claims of invalidity.

Yours very truly,

JOHN A. LUCE, Mayor."

6. That after the sending of said letter, the said transcripts of the proceedings regarding the said bond issues, were sent to said Sweet, Causey, Foster and Company as averred in said Bill of Complaint, and that said plaintiffs served the following notice in writing upon the defendant, the City of Bozeman, and the defendant, John A. Luce, Mayor, rejecting the said bonds, said rejection being in the following words and figures, to wit:

"June 10, 1916.

The City of Bozeman,

Honorable John A. Luce, Mayor,

Bozeman, Montana.

Dear Sir:

The agreement of May 18th, 1916, which Mr. L. E. Torrence purported to make on behalf of our associates and ourselves covering the \$305,000 municipal bonds of the City of Bozeman, offered for sale on that day, contains the provision that at the end of two weeks time from the receipt of the transcripts pertaining to said bond proceedings we shall announce our acceptance or rejection thereof as to the legality of said proceedings. [56]

The said certified transcripts which you sent us by express were received by us on Saturday, May

27th, 1916, and in accordance with suggestion contained in your letter to us dated May 25th were submitted to our attorneys. We telegraphed you on June 8th briefly that our attorneys had declined to approve the legality of said proceedings, and this morning handed you their opinion thereon bearing date June 7th, 1916. Upon this opinion, we are forced to announce our rejection.

Yours very truly,  
SWEET, CAUSEY, FOSTER & CO.

By C. N. PHILLIPS."

7. That since the 10th day of June, 1916, the said plaintiffs have never attempted in any way or manner until the bringing of this suit to establish the illegality of said bonds or to furnish the defendants with blank bonds as provided in said contract, mentioned and set forth in Plaintiffs' Bill of Complaint, or to comply with the same and that after the receipt of the said letter of June 21, 1916, with the opinion of Pershing, Titsworth and Fry, dated June 20, 1916, herein set forth defendants being convinced that the plaintiffs did not intend to take said bonds, proceeded to and did sell the said bonds to Harris Trust and Savings Bank, which bank has agreed to accept said bonds as legal.

8. That it is absolutely necessary in order to carry out the said plans of the City of Bozeman and to provide adequate sewage system and adequate water supply for the City of Bozeman, that it shall receive promptly the proceeds from the sale of said bonds; and that any further delay and the issuance of an injunction herein would cause the said defendant,

the City of Bozeman, great and irreparable damage and injury and have the effect of preventing the completion of said work for a long time. [57]

9. That relying upon the contract between the plaintiffs and defendant, the City of Bozeman, the City of Bozeman proceeded to call said \$100,000 of water works bonds to be paid on the 1st day of July, 1916, that the dilatory tactics of the plaintiffs in endeavoring to get out of said contract in the purchase of said bonds and the taking of the said bonds and the taking of the three inconsistent and irreconcilable positions regarding said contract and said bonds, and their demand of the City to commence anew and readvertise and take new proceedings entirely delayed the said City of Bozeman and it would have prevented entirely the carrying out of the said water works and sewage projects, had the said City of Bozeman not sold said bonds to the Harris Trust and Savings Bank.

10. That relying upon the sale of said bonds to the Harris Trust and Savings Bank, the said City of Bozeman has procured the Commercial National Bank of Bozeman, Montana, to take up and pay off said \$100,000 of outstanding water bonds on the 1st day of July, 1916, to be reimbursed out of the proceeds of the sale of said \$305,000 bonds involved in this suit to the said Harris Trust and Savings Bank.

11. That relying upon the contract between plaintiffs and defendant, the City of Bozeman, the City of Bozeman advertised for bids for the construction of storm and sanitary sewers and bids had been received and contracts awarded, and the contractors

are awaiting for the final consummation of the said sale to said Harris Trust & Savings Bank, before commencing the work, which said contract has been let.

12. That the plaintiffs, through said Sweet, Causey, Foster Company, at a meeting of the City Council of said [58] City of Bozeman, held on the 10th day of June, 1916, upon request of the defendant, John A. Luce, as Mayor of said city, to state to said Council whether they would take said bonds or not, declined to state whether they would so take them or not and their representative, said Philips, whose name is signed to the said notices herein set forth, declined to state whether they claim said contract to be legal or illegal and refused to take any position regarding the same, except only to demand the return of the certified checks of \$4,000.

13. That because of the delay caused by the unreasonable unwarranted and unlawful conduct of the plaintiffs, the defendant, the City of Bozeman, has already been greatly damaged in a sum largely in excess of \$4,000; and that if the injunction is issued, as prayed for herein, the City of Bozeman could not receive this money upon said bonds from the plaintiffs after the final hearing of this case and the said bonds were printed, signed and delivered in time to complete said work during the season of 1916, at the great and irreparable injury and damage of the defendant, the City of Bozeman, and its residents, that the injury to the defendants, the City of Bozeman, and to the residents thereof, by reason of the issuance of the injunction or the decree of the specific

performance herein will be great and irreparable and will be a damage and injury to the health and comfort of the people of the said defendant, the City of Bozeman and might involve it in litigation with Harris Trust and Savings Bank, and in case of fire in certain portions of the city might result in a loss of thousands of dollars worth of property. That the injury to the plaintiffs, if any, can be measured entirely in dollars and cents; if said bonds are in fact legal, the plaintiffs could in the proper action, recover the said certified checks, or the value thereof in an action at law. [59]

14. That the plaintiffs are not entitled to receive said bonds from the defendant, the City of Bozeman, because they have repeatedly refused to take same as hereinbefore set forth and have notified the defendants of the rejection of said bonds and have demanded as a condition precedent to the taking of the same, an entirely new advertisement for said bonds, the payment of over \$58,000 of indebtedness in the excess of the legal limits of the indebtedness of the said City of Bozeman and the readvertisement of said bonds for sale and to hold another election at great cost and expense to the City of Bozeman, which proceedings, if had, as demanded would not be proceedings, to validate the proposed issues of bonds, but the creation of a new issue of bonds, and that it would to take such proceedings, prevent for many months, the consummation of the purposes desired by the issuance of said bonds, whereas, if the defendants are allowed to sell said bonds and deliver the same to the said Harris Trust and Savings Bank,

said work can progress and the contractors are willing to immediately commence the work for which said bonds are to be issued.

WHEREFORE, the defendants having fully answered, pray that the said injunction be not granted; that the decree of specific performance of said contract be not made; that said bill be dismissed; that if the same shall not be dismissed that this Court find that the plaintiffs are not entitled to the return of said checks and that the defendant, the City of Bozeman, is entitled to the same under the terms of said contract; that the defendants recover of and from the plaintiffs, the costs and disbursements in this cause and for such other and further relief as may be meet in the premises, the defendants will ever pray. [60]

CITY OF BOZEMAN,  
A Corporation.

JOHN A. LUCE,  
Mayor of City of Bozeman,  
And C. A. SPIETH,  
City Clerk of the City of Bozeman.  
By JOHN A. LUCE,  
HARRY D. KREMER,  
Their Solicitors.

(Duly verified.)

(Filed July 20, 1916. Geo. W. Sproule, Clerk.

[61]

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Thereafter, on February 13, 1917, the Decision and Opinion of the Court was duly filed herein, in the words and figures following, to wit: [62]

(Title of Court and Cause.)

**Memorandum Decision.**

Herein the Court finds for plaintiffs and against defendants; and therefrom the Court concludes plaintiffs are entitled to an injunction as prayed.

Feb. 13, 1917.

BOURQUIN, J.

**MEMO.**

Plaintiffs having deposited certified checks upon a bid for defendants' sewer and water bonds, later asserted the bonds would be illegal if issued, and demanded return of the checks. Defendants refused return, insisting the bonds would be legal.

Between the parties was a written agreement of that largely implied by law, that if the bonds were legal plaintiffs would pay in full or forfeit the checks as liquidated damages, and if illegal, defendants would return the checks. This suit is to enjoin transfer or collection of the checks and to compel their return. Only legal questions are involved, and but one, determinative of the case, will be noticed.

Section 3259, subd. 64, Rev. Codes Montana, provides that cities may become indebted and issue bonds for sewers and water, amongst other things; provided, that the total indebtedness must not exceed 3% of the city's assessed property valuation; provided, no money must be borrowed on bonds for sewers or water until the proposition has been submitted to and approved by the taxpayers; "and further provided that an additional indebtedness shall be incurred when necessary" for sewers or water, but this

additional indebtedness "shall not exceed 10% over and above the 3%" referred to; "and provided further, that the above limit of 3% shall not be extended, unless the question shall have been submitted to" and [63] carried in the affirmative by the votes of the taxpayers.

At all material times herein defendants' debts exceeded the 3% limit. The council's resolutions to submit to the electors the question of these bonds, the notices of election, and the subsequent ordinances for the issue of the bonds, described them as sewer and water bonds, but did not state or advise that they would extend or be in excess of the 3% limit. Accordingly it is believed that the question of incurring bonded debts extending or exceeding the 3% limit was not submitted to and voted upon by the electors. Consequently, the council not having strictly pursued the statute, had no authority to issue these bonds, and if issued they would be illegal.

Although the statute does not define how the question shall be brought home to electors, it is intended to subserve a useful purpose and contemplates and intelligent vote by an electorate having knowledge that it is to determine not only that a bonded debt shall or shall not be incurred, but also that it is a proposed bonded debt extending or exceeding the 3% limit. The question that the statute directs shall be submitted is not, shall the city incur a bonded debt, but is, shall the city incur a bonded debt extending or exceeding the 3% limit. To vote for the first is not to vote for the last. Electors would vote for the first, encumbering their property not more than 3%, who

would not vote for the last, encumbering it more than 3%. And notice to vote upon the question of proposed bonded debts, is not notice to vote upon the question of proposed bonded debts extending or exceeding the 3% limit.

The notices of election were fatally defective. And this, in reason, whether the proposed debt will be the first extension of the 3% limit, or only an addition to an existing extension. All of this is of the general law of elections. [64] The point has not been passed upon by the state Supreme Court, though the statute is involved in *Lepley v. Fort Benton*, 51 Mont. 551; *Arnold v. Miles City*, 46 Mont. 478; *Carlson v. Helena*, 39 Mont. 104, and cases in them cited.

It is not material that plaintiffs' refusal to take the bonds was based on other and in part, at least, untenable grounds of illegality. Their bid was for legal bonds. Defendants knew the facts of illegality, and for which was no remedy but new proceedings and involving new bids.

It will be noted this decision deals with the situation as it was when plaintiffs refused the bonds, and not with what it might be by reason of presumptions, recitals and estoppels after and if the bonds were issued.

Plaintiffs' refusal was justified and they were entitled to return of the checks. Certified, the latter are not overdue, and plaintiffs are entitled to protection against *bona fide* indorsees, are entitled to the relief prayed for, and it is so decreed.

BOURQUIN, J.

Filed Feb. 13, 1917. Geo. W. Sproule, Clerk.

Thereafter, on February 17, 1917, Decree was duly filed and entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Decree.**

This cause came on to be heard at this term and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged and decreed as follows, to wit:

That the defendants be and they are hereby ordered and directed to deliver to the Clerk of this court on or before the 24th day of February, 1917, those two certified checks drawn by Sweet, Causey, Foster & Company on the Interstate Trust Company of Denver, Colorado, payable to the order of L. E. Torrence and indorsed by him and delivered to the defendant C. A. Spieth, City Clerk of the City of Bozeman, on the 18th day of May, 1916, pursuant to the terms of the contract for the purchase of the bonds described in the bill of complaint that plaintiffs entered into with the City of Bozeman by the said L. E. Torrence as agent of the plaintiffs, being the checks described in the bill of complaint.

It is further ordered that the plaintiffs do have and recover from the defendants herein their costs taxed at the sum of One Hundred Eighty-four 80/100 Dollars (\$184.80).

Dated February 17, 1917.

GEORGE M. BOURQUIN,  
Judge.

Filed and entered Feb. 17, 1917. Geo. W. Sproule,  
Clerk. [66]

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Thereafter, on Feb. 26, 1917, Petition for Appeal was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Petition for Appeal.**

To the Honorable GEORGE M. BOURQUIN, District Judge:

The above-named defendants, feeling aggrieved by the decree rendered and entered in the above-entitled cause on the ~~17th~~ day of February, A. D. 1917, do hereby appeal from the said decree to the Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith, and they pray that their appeal be allowed, and that citation be issued as provided by law, and that a transcript of the record proceedings and documents upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit, under the rules of such court in such cases made and provided.

And your petitioners further pray that the proper order relating to the required security to be required of them be made.

H. D. KREMER,  
GEORGE Y. PATTEN,  
Attorneys for Appellants.

Filed Feb. 26, 1917. Geo. W. Sproule, Clerk.  
[67]

Thereafter, on Feb. 26, 1917, Assignment of Errors was duly filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Assignment of Errors.**

Come now the defendants in the above-entitled cause, and file the following assignment of errors upon which they will rely upon their prosecution of the appeal in the above-entitled cause from the decree made by this Honorable Court on the 14th day of February, 1917.

I.

That the District Court for the District of Montana erred in holding that the question of the City of Bozeman incurring bonded debts extending or exceeding the three per cent limit (under the provisions of Sec. 6, Art. XIII, of the Constitution of Montana, and Sec. 3259, subdiv. 64, of the Rev. Codes of 1907) was not submitted to and voted upon by the electors of said city, for the reasons: [68]

(1) Under the laws of Montana the question to be submitted, and which was submitted, was whether the bonds should be issued, and in voting in favor of issuing the bonds, the electors thereby voted to extend the three per cent limit.

(2) The statutes of Montana define how the question of extending or exceeding the three per cent limit of indebtedness of cities for water and sewer purposes shall be submitted to the electors, the form of submission being prescribed in Sec. 3454 et seq., Rev. Codes of Mont. of 1907.

(3) The questions to be voted upon by the electors, as stated in the Council's resolutions to submit to such electors the question of said bonds, the notices of election, the ballots and the subsequent ordinances for the issue of the bonds, conformed to and complied with the provisions of said statutes.

## II.

That said District Court erred in holding that the issue of the bonds in question herein, to wit, the water works bonds of said city aggregating \$235,000, and the sewer bonds of said city aggregating \$70,000, would be or were illegal, for the same reasons.

## III.

That the said District Court erred in finding for the plaintiffs and against the defendants, for the same reasons.

## IV.

That the said District Court erred in making and entering its decree herein on February 14, 1917, in favor of the plaintiffs and against the defendants, for the same reasons. [69]

WHEREFORE, the appellants pray that said decree may be reversed, and that said District Court for the District of Montana be ordered to enter a decree reversing the decision of the lower court in said cause.

H. D. KREMER,  
GEORGE Y. PATTEN,  
Attorneys for Appellants.

Filed Feb. 26, 1917. Geo. W. Sproule, Clerk.

Thereafter, on Feb. 26, 1917, Order Allowing Appeal was duly entered herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Order Allowing Appeal and Fixing Amount of Bond.**

On motion of H. D. Kremer, Esquire, and George Y. Patten, Esquire, attorneys for defendants, it is hereby ordered that an appeal to the Circuit Court of Appeals for the Ninth Circuit be, and the same is hereby, allowed, and that a certified transcript of the record testimony, exhibits, stipulations and all proceedings, be transmitted to said Circuit Court of Appeals for the Ninth Circuit. It is further ordered that the bond on appeal be fixed at the sum of \$300, the same to act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated February 26th, 1917.

GEORGE M. BOURQUIN,  
Judge.

Filed and entered Feb. 26, 1917. Geo. W. Sproule,  
Clerk. [71]

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Thereafter on March 5, 1917, Bond on Appeal was duly approved and filed herein, in the words and figures following, to wit:

(Title of Court and Cause.)

**Bond on Appeal.**

KNOW ALL MEN BY THESE PRESENTS,  
that we, City of Bozeman, a municipal corporation,

by L. W. Truitt, Mayor of the City of Bozeman, and C. A. Spieth, City Clerk of the City of Bozeman, as principal, and J. H. Baker and Amos C. Hall, as sureties, of the county of Gallatin, State of Montana, are held and firmly bound unto Sweet, Causey, Foster & Company, a corporation, James N. Wright & Company, a corporation, and C. W. McNear & Company, a corporation, in the sum of three hundred dollars, lawful money of the United States, to be paid to them and their respective executors, administrators and successors; to which payment well and truly to be made we bind ourselves and each of us, jointly and severally, and each of our heirs, [72] executors, administrators and successors, by these presents.

Sealed with our seals, and dated this 28th day of February, 1917.

WHEREAS, the above-named City of Bozeman, L. W. Truitt, as Mayor thereof, and C. A. Spieth, as City Clerk thereof, have prosecuted an appeal to the Circuit Court of Appeals for the Ninth Circuit to reverse the decree of the District Court for the District of Montana in the above-entitled cause.

NOW, THEREFORE, the condition of this obligation is such that if the above-named City of Bozeman, a municipal corporation, L. W. Truitt, as Mayor thereof, and C. A. Spieth, as City Clerk thereof, shall prosecute their said appeal to effect, and answer all costs if they fail to make good their

plea, then this obligation to be void; otherwise to remain in full force and effect.

[Seal] CITY OF BOZEMAN,  
By L. W. TRUITT,  
Mayor.

C. A. SPIETH,  
City Clerk.  
J. H. BAKER.  
AMOS C. HALL. [73]

State of Montana,  
County of Gallatin,—ss.

On the — day of February, 1917, personally appeared before me L. W. Truitt and C. A. Spieth, known to me to be the Mayor and City Clerk, respectively, of the City of Bozeman, a municipal corporation, and the persons described in and duly executed the foregoing instrument as officers of said corporation, and respectively acknowledged to me that the said corporation executed the same for the uses and purposes therein set forth.

Also personally appeared before me J. H. Baker and Amos C. Hall, respectively known to me to be the persons described in and duly executed the foregoing instrument as parties thereto, and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein set forth.

And the said J. H. Baker and Amos C. Hall, being respectively by me sworn, says, each for himself and not one for the other, that he is a resident and householder of the said county of Gallatin, State of Montana, and that he is worth the sum of \$300 over and

above his just debts and legal liability and property exempt from execution.

L. W. TRUITT.  
C. A. SPIETH.  
J. H. BAKER.  
AMOS C. HALL.

Subscribed and sworn to before me this 28th day of February, 1917.

[Notarial Seal]      GEORGE Y. PATTEN,  
Notary Public for the State of Montana, Residing at  
Bozeman, Montana.

My Commission expires January 3, 1920. [74]

The within bond is approved both as to sufficiency and form this 5th day of March, 1917.

GEORGE M. BOURQUIN,  
Judge.

Filed March 5, 1917. Geo. W. Sproule, Clerk.  
[75]

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Thereafter, on March 14, 1917, the Statement of the Evidence herein was duly approved and filed, being in the words and figures following, to wit:

(Title of Court and Cause.)

#### **Statement of the Evidence.**

BE IT REMEMBERED that on the 10th day of January, 1917, at a stated term of the said court begun and holden in Helena, in the District of Montana, before his Honor, George M. Bourquin, District Judge, the issue joined in the above-stated cause between the said parties came on to be heard before the said Judge without the intervention of a jury,

the plaintiffs being represented by Messrs. Day & Mapes, their attorneys, and the defendants by Harry D. Kremer, Esquire, and George Y. Patten, Esquire; and upon the trial of that issue the attorneys for the plaintiffs, to maintain and prove the said issue on their part, offered the following evidence, to wit:

**Testimony of C. N. Phillips, for Plaintiff.**

C. N. PHILLIPS, called as a witness on behalf of the plaintiffs, [76] having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I reside in Denver; am treasurer of the plaintiff Sweet, Causey, Foster & Company, and have charge of the municipal department of that business, which is that of buying municipal and other bonds. They have their office in Denver. I am familiar with the proceedings surrounding the transactions in suit as far as they were conducted by said plaintiff. I have in my possession correspondence of that company so far as it relates to these transactions.

Whereupon Plaintiffs' Exhibit "A," being a copy of the agreement set out at length in the bill of complaint (see page . . . .), was identified by the witness and admitted in evidence. Plaintiffs' Exhibit "B," being a copy of a telegram dated May 22, 1916, from Sweet, Causey, Foster & Company to C. A. Spieth, City Clerk, Bozeman, Montana, set out at length in paragraph 6 of the answer (see page . . . .), was identified by the witness and admitted in evidence.

Whereupon Plaintiffs' Exhibit "C" was identified by the witness as a telegram dated May 26, 1916, re-

ceived by Sweet, Causey, Foster & Company, signed by the City of Bozeman, by John A. Luce, Mayor, and was admitted in evidence, and read as follows:

**Plaintiff's Exhibit "C"—Telegram, May 26, 1916,  
City of Bozeman to Sweet, Causey, Foster  
& Co.**

"Your telegram regarding Bonds purchased at hand feel assured every proceeding legal time is short bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity if claimed must be shown by purchaser council considered your bid best and no provision of contract will be waived am sending by express complete transcripts except final adoption of ordinances which will be adopted june first in forms as they appear in transcript minutes of may eighteenth and twenty second are correct merely lack final approval on june first feel sure a good attorney will find no illegality am writing." [77]

Whereupon Plaintiffs' Exhibit "D," being a letter written by Sweet, Causey, Foster & Company to the defendant John A. Luce, Mayor of the City of Bozeman, dated May 27, 1916, was identified by the witness and admitted in evidence, and read as follows:

**Plaintiff's Exhibit "D"—Letter, May 27, 1916,  
Sweet, Causey, Foster & Co. to John A. Luce,  
Mayor of the City of Bozeman.**

"This will acknowledge receipt of your night letter received yesterday morning reading as follows:

"Your telegram regarding bonds purchased at hand. Feel assured every proceeding legal. Time

is short. Bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity if claimed must be shown by purchaser. Council considered your bid best and no provision of contract will be waived. Am sending by express complete transcripts except final adoption of ordinances which will be adopted June first in forms as they appear in transcript minutes of May 18th and 22d, are correct, merely lack final approval on June 1st. Feel sure a good attorney will find no illegality. Am writing,—the same being in reply to our night letter of a few days ago sent your City Clerk, which read as follows: 'Just received from Torrence contract which he purported to sign on behalf of our associates and ourselves for purchase of bonds. He had no authority to bid except strictly subject to the approval of our attorneys as to legality of the bonds proposed to be issued. This is the only way in which we bid for bonds. We are willing to let the bid stand as ours subject to the approving opinion of our attorneys as to the legality of the issues which opinion shall be conclusive, but we absolutely cannot assume the further responsibility of otherwise establishing illegality if our attorneys should decline to approve legality of bond issues. If you are willing to accept this condition let us know, and forward certified transcripts for examination, otherwise please return to us our certified checks.'

We are at a loss to interpret the meaning of the clause which you inserted in the contract which Mr. Torrence signed as to establishing illegality if claimed. When we purchase bonds we always sub-

mit the legal transcript to a firm of recognized bond attorneys, and depend upon their opinion as to the legality of the issue, and that is what we expected to do with your bonds when we sent Mr. Torrence there to bid on them; in fact, that is what we would still like to do, but we cannot recede from the position taken in our former telegram.

We note from your wire that a certified transcript has been forwarded by express, and that you are [78] writing us, and hope that your letter will enlighten us as to your views. If we are still in doubt after receipt of your letter as to what shall determine the legality or illegality of your bonds to your satisfaction, it is likely that the writer will go to Bozeman to talk the matter over with you, as we are confident that by talking together we could quickly reach a mutually satisfactory understanding."

The WITNESS.—Plaintiffs' Exhibit "E," now shown me, is a letter received by us signed by John A. Luce, Mayor of Bozeman, written subsequently to his telegram marked Exhibit "C," and confirming that telegram. It was received subsequently to the writing of the letter Plaintiffs' Exhibit "D," but apparently written and dated prior.

**Plaintiff's Exhibit "E"—Letter, May 25, 1916, John E. Luce, etc., to Sweet, Causey, Foster & Co.**

Plaintiffs' Exhibit "E," being a letter written by the defendant John A. Luce to the plaintiff Sweet, Causey, Foster & Company, dated May 25, 1916, was admitted in evidence and read as follows:

"Yesterday I arrived home from Billings where I was attending a meeting of the Executive Com-

mittee of the Municipal League of Montana Cities. Mr. Spieth, the City Clerk, presented your telegram to me last night and I do not quite understand your position. Have just wired you as follows:

'Your telegram regarding bonds purchased at hand. Feel assured every proceeding legal. Time is short. Bidders had transcript of proceeding so as to determine validity and notice was given at sale that invalidity, if claimed, must be shown by purchaser. Council considered your bid best and no provision of contract will be waived. Am sending by express complete transcripts except final adoption of ordinances which will be adopted June first in forms as they appear in transcripts. Minutes of May eighteenth and twenty-second are correct, merely lack final approval on June first. Feel sure a good attorney will find no illegality. Am writing.'

The proceedings in the matter of the bond issue have all been carefully prepared and scrutinized by Mr. Harry D. Kremer, City Attorney, and myself.

I have practiced law thirty years in Montana and we were careful to make these elections and bond issues in every respect according to law. It was the purpose of the City in furnishing transcripts of proceeding prior to sale so that the question you injected into the matter could not exist. In other words, we expected [79] prospective bidders to satisfy themselves of the proceedings before the bids were made. One bond company who bid within \$10 of the price bid by your representative showed to our City attorney the opinion of Woods & Oakley, eminent bond attorneys of Chicago, as to the validity of the

proceedings up to that time. With these facts before me I notified all prospective bidders before the sale that two weeks would be allowed for examination of the proceedings, and if invalidity was claimed the invalidity must be established by the purchaser. All bidders bid with this distinct understanding, and the contract was drawn and signed by Mr. L. E. Torrence for you and your associates.

The City does not expect any one to take illegal bonds, but on the contrary the City will not allow this bond issue to be held up by the mere whimsical opinion of any attorney, especially as the bids were made with the distinct understanding as above set forth.

I am sure if the bonds had been sold to the Harris Trust & Savings Bank no contention such as you make would have arisen, and there was only \$5 difference on the bids on each issue.

The Council, relying upon your bid, which we deemed *bona fide*, and upon your contract as signed, has ordered the City Treasurer to call the One Hundred Thousand Dollars worth of outstanding waterworks bonds which are to be paid off out of the \$235,000 of waterworks bonds sold. The call is for July 1, 1916.

It is also vitally necessary that work on the sewer and waterworks should not be delayed. The council has already received bids for a large portion of this work. The season here is short, and delay in the final consummation of this purchase by you will damage the City immensely under these circumstances. The City must positively decline to return

any checks to you or to modify the contract in any way. I presume that you and your associates really desire the bonds and feel that you are raising a question now which will not arise after you have examined the proceedings.

We are sending to you full transcripts of all proceedings, except only the final passage of the ordinances prescribing forms of the bonds. These ordinances have been introduced in the Council, read, and referred to the judiciary committee, and will be passed and approved June 1, 1916, in the form as set forth in the transcripts and on that date will receive my signature and the signature of Mr. Carl A. Spieth, City Clerk.

In fact, the forms of these ordinances were upon the table when the bonds were sold and bidders were asked to go forward and inspect the same. Mr. L. E. Torrence was furnished with complete copies of the proposed ordinances immediately after the sale on May 18th, and he was requested to forward the same to you. The officers of the City knew nothing about any custom of your company, or any reservations that you may have intended to make, but the announcement of what the City expected was made to all bidders and clearly understood when your bid was accepted. [80]

Officers of the City had knowledge that Mr. Torrence had represented you in many bond sales in Montana for sometime past. Furthermore, the certified checks filed by him were made to you and by your cashier endorsed to Mr. Torrence, personally.

It is apparent that you could not possibly question

(Testimony of C. N. Phillips.)

Mr. Torrence's agency in this particular matter.

However, I am sure that when the transcripts are examined any question that you may now have will be dispelled and that the bonds will be taken by you under the contract.

After your attorneys have examined and passed upon the transcripts, you will probably desire that the signatures be inserted approving the ordinances, and also that the approval of the Minutes of May 18th and May 22nd shall be inserted, and also a transcript of the Minutes of June 1, 1916, regarding the passage of these ordinances.

These will be made and affixed to the transcript and returned to you, as soon after the transcripts are received as they can be prepared and attached.

If your attorneys claim any illegality in the proceedings, kindly return the transcripts to Mr. Carl A. Spieth, City Clerk, at once, pointing out any claims of invalidity."

The WITNESS.—Upon receipt of the transcripts from Bozeman they were immediately submitted to Messrs. Pershing, Titsworth & Fry, a firm of attorneys in Denver of excellent standing, specialists in the examination of municipal bonds. They were the bond experts of Denver houses, and examined probably seventy-five to ninety per cent. Their opinions as to the validity of bonds were accepted in the Denver markets. This transcript, prior to the commencement of this suit, was also submitted to Mr. Charles B. Wood, of Wood & Oakley, in Chicago.

Q. And what is the standing of Messrs. Wood & Oakley?

(Testimony of C. N. Phillips.)

Mr. PATTEN.—That is objected to as immaterial.

The COURT.—I am inclined to think so. Be brief.

The WITNESS.—Mr. Wood, I understand, is the best known bond attorney in the United States, and the man whose opinion is accepted most widely. Wood & Oakley, to whom I submitted the transcript, are the identical persons referred to in Mr. [81] Luce's letter, Plaintiffs' Exhibit "E." Plaintiffs' Exhibit "F" is the opinion of Messrs. Pershing, Titsworth & Fry on these bonds. I was in Bozeman during the negotiations, and subsequent to the public sale of the bonds. I think I delivered a letter to the officers of the City of Bozeman, of which this is practically a copy. I think there was a slight change in the wording of the letter the attorneys desired to make. They are substantially the same. This letter was delivered to us under date of May 29, 1916.

Mr. DAY.—We now offer in evidence Plaintiffs' Exhibit "F."

Mr. PATTEN.—We object to that as immaterial, and that it does not sustain any of the allegations in the complaint. The bonds having been disposed of, and the court having previously declined to enjoin defendants from selling them, that part of the case is eliminated. Further, the question as to the validity of the bonds is one which presents itself to this court, and is not one which would be for the opinion of attorneys. The opinion of attorneys could only guide plaintiffs as to their conduct at the

(Testimony of C. N. Phillips.)

time, and the ultimate question, and the question to be decided now, is whether the bonds were, in fact, valid or invalid.

Mr. DAY.—Upon that proposition I might state frankly my position in regard to the matter. The City, in offering bonds for sale, implied that the bonds are legal and marketable. No contract entered into by the Mayor or any other officer of the City and a third person can compel the third person to accept the bonds, or authorize the City to forfeit any deposit made upon that purchase. These objections by the attorneys as to the validity of this issue goes to the marketability of the bonds, and your Honor will not, sitting as a Court of Equity, [82] forfeit this penalty when the defendant City has put it beyond the power of the Court to enforce the validity of the bonds, but your Honor will hold that they are legal. In other words, the City cannot just grab off \$4,000, without attempting to deliver marketable bonds.

The COURT.—I do not think that the opinion of the attorney would cut any figure in the case. If that were the case, there never could be a sale of bonds except when the attorneys agreed.

Mr. DAY.—The point is that the contract with the City—if it is valid and binding—provided a method by which the legality might be determined, and the City made no effort when these objections were made to it to remedy the objections. Now certainly the City cannot forfeit this penalty or this deposit without attempting on its part to comply with reasonable

(Testimony of C. N. Phillips.)

objections made; and upon that phase of the case it seems to me that this is admissible as evidence.

Mr. PATTEN.—In view of the statement of Mr. Day, this testimony is shown to be immaterial by the fact that the contract of the defendants was to furnish valid, legal bonds, and were not to furnish bonds which would be marketable at Denver or in any other bond market.

The COURT.—I will receive this under the usual ruling of the Court. The objection is overruled *pro forma*. Exception may be noted for counsel for the defendants. Certainly the Court is not receiving this opinion to control or bind it as to the legality of these bonds.

Whereupon Plaintiffs' Exhibit "F," being a letter written by Pershing, Titsworth & Fry to the plaintiff Sweet, Causey, Foster & Company, dated May 29, 1916, was read as follows: [83]

**Plaintiffs' Exhibit "F"—Letter, May 29, 1916,  
Pershing, Titsworth and Fry to Sweet, Causey,  
Foster & Co.**

"We have examined the certified records submitted in the above matters and we regret to advise you that we cannot approve the same. The reasons for our disapproval are as follows:

1. The first question submitted to the electors under Resolution No. 695 and the notice of election was: 'The question of the said city issuing waterworks bonds upon the credit of the city in the sum of \$235,000, the proceeds from the sale thereof to be used as follows: One hundred thousand dollars

for redeeming the present outstanding waterworks bonds, and the balance in extending, improving and enlarging the present waterworks system, and acquiring an auxiliary or additional waterworks system from Bozeman Creek, for the city of Bozeman.'

You will observe that this question submits two questions, to wit: (1) the question of authorizing bonds to refund the outstanding water bonds, and (2) the question of authorizing bonds for additional water works. These two questions were submitted as one proposition and the electors were compelled to vote for or against both questions, without an opportunity to vote for one and against the other.

The authorities on this question are almost unanimous in holding that it is improper and illegal to submit two separate and distinct questions in one proposition. We refer you to the case of Stern v. Fargo, 26 L. R. A. (N. S.) 665, and the decisions cited in the main case and also in the footnote to said case.

It may be argued that the statutes of Montana do not require the question of issuing refunding bonds to be submitted to a vote of the electors and that therefore the reference to such bonds in these proceedings can be disregarded as surplusage. We cannot agree with such a conclusion. While the statutes do not require the refunding question to be submitted, there is no way of telling how many voters were induced to vote for the water bonds in order to approve the refunding bonds.

2. The statutes of Montana provide that the three per cent. debt limit 'shall not be extended unless the

question shall have been submitted to a vote of the taxpayers affected thereby.' The financial statement contained in the record shows that it was necessary to extend the three per cent. limit, and in our opinion the question of the extension of such limit should have been submitted to the electors of the city.

3. The record shows that if the proposed bonds are issued the city will have a general outstanding indebtedness amounting to \$492,975. The city also has outstanding improvement district indebtedness of \$286,386.00, but the record does not show whether the city is liable for any such debt. The assessed valuation of 1915 is given at \$3,209,196.00. Under the Montana constitution and statutes, a city is limited in the debt which it can incur for all purposes to 13% of its assessed valuation. [84] Thirteen per cent. of the 1915 valuation would limit this city to a debt of \$417,195.00. Therefore, the city is attempting to exceed the debt limit in the amount of \$75,-780.00, not considering the improvement district debt.

In connection with this opinion, we refer you to the recent Montana decisions, to wit: Lepley v. City of Ft. Benton, 154 Pac. 710; Arnold v. Miles City, 128 Pac. 915; Butler v. Andrus, 90 Pac. 785, and the other Montana cases cited therein.

4. Section 3459, Revised Codes of Montana, provides: 'A tax to be fixed by ordinance must be levied each year for the purpose of paying interest on the bonds and to create a sinking fund for their redemption.'

(Testimony of C. N. Phillips.)

In the waterworks proceedings a tax levy has been provided of one mill on each dollar of assessed valuation for the payment of interest and for the purpose of creating a sinking fund. This levy is not sufficient even to pay the interest on the proposed waterworks and refunding bonds. It is provided that the net proceeds from the sale of water shall also be placed in these funds, but such provisions are ineffective.

The sewer proceedings provide a levy of one and one-half mills on each dollar of assessed valuation which would be sufficient to pay the interest on the proposed sewer bonds, but would not be sufficient to provide a proper sinking fund.

We return the records herewith."

The WITNESS.—Plaintiffs' Exhibit "G" is the opinion of Charles B. Wood, of the firm of Wood & Oakley, of Chicago, heretofore mentioned by me.

Mr. DAY.—We now offer Plaintiffs' Exhibit "G," purporting to be a letter from Mr. Wood, of the firm of Wood & Oakley, attorneys, relative to the defects appearing upon the record of this issue of bonds.

Mr. PATTON.—We object to the offer of Plaintiffs' Exhibit "G" upon the ground that it is wholly immaterial; that the only purpose it could serve would be to sustain the allegations in the bill of complaint seeking to enjoin the defendant city from disposing of the bonds, and the Court having refused an injunction, and the city of Bozeman having disposed of the bonds that question is not now before

(Testimony of C. N. Phillips.)

the Court. Furthermore, the question [85] as to the validity of the bonds is one for the Court, and not one for attorneys. It is not alleged in the bill that Messrs. Wood & Oakley, or Mr. Wood, were counsel for the plaintiffs, or that plaintiffs acted upon their opinion. These gentlemen, Mr. Wood, or Wood & Oakley, do not seem to have been attorneys even for the plaintiffs.

Which objection was overruled, and an exception noted by defendants.

Whereupon Plaintiffs' Exhibit "G," being a letter from Charles B. Wood, of Wood & Oakley, lawyers, of Chicago, to the plaintiff Messrs. C. W. McNear & Company, of Chicago, Illinois, dated June 7, 1916, was read as follows:

**Plaintiff's Exhibit "G"—Letter, June 7, 1916, Wood  
to G. W. McNear & Co.**

"I will approve \$100,000 Water Refunding Bonds and \$70,000 Sewer Bonds of the City of Bozeman, Montana, dated July 1, 1916, provided:

1. It is shown that the bonds were offered to the State Land Board.
2. It is shown that the County Attorney approved the issuance of the bonds in an opinion duly given.
3. As to the Refunding Bonds, it will be necessary for you to see to it that the old bonds are cancelled when the new issue is put forth.

I decline to approve \$135,000 Water Extension Bonds of the City of Bozeman, Montana, dated July 1, 1916, for the following reasons:

(Testimony of C. N. Phillips.)

1. It appears that at the election called to vote upon these bonds two matters were submitted upon a single ballot, to wit: the issue of \$100,000 Refunding Bonds and \$135,000 Water Extension Bonds, and this of course did not afford a voter the opportunity to vote separately upon the questions. The refunding Bonds were not necessary to be submitted at all, and they are approved as above stated, on merely the passage of the ordinance.

2. The issue of these Water Extension Bonds would make the city indebted in excess of the thirteen per cent limit, being the limit imposed by the laws of Montana. My suggestion is that new proceedings be had to authorize these bonds for a reduced amount that will bring them within the thirteen per cent limit."

Whereupon Plaintiffs' Exhibit "H," consisting of the letter from the plaintiff Sweet, Causey, Foster & Company, to the Mayor and City Council of the City of Bozeman, dated June [86] 21, 1916, with the letter dated June 20, 1916, to the plaintiff Sweet, Causey, Foster & Company for Pershing, Titsworth & Fry, both of which are set out at length in paragraph 7 of the answer (see pages — and —) were admitted in evidence.

The WITNESS.—The City of Bozeman did not at any time subsequent to the standing of that letter from Sweet, Causey, Foster & Company to the Mayor and City Council of Bozeman, Plaintiffs' Exhibit "A," comply with the demands therein contained,

(Testimony of C. N. Phillips.)

or do anything else in respect to the legality of this issue of bonds.

Cross-examination.

The WITNESS.—The two sheets of paper defendants' Exhibit No. 1, were handed to me personally in the defendant John A. Luce's office in Bozeman, on June 10, 1916, and Mr. Luce at that time requested me to forward these to my house, Sweet, Causey, Foster & Company, and I did so. Defendants' Exhibit No. 2 was written after Messrs. Sweet, Causey, Foster & Company had had submitted to them Defendants' Exhibit No. 1.

Whereupon Defendants' Exhibit No. 1 was admitted in evidence, and read as follows:

**Defendants' Exhibit No. 1.**

**"SUBMISSION OF DOUBLE QUESTION.**

The notice of election for bonds 'must state the time and place of holding the election, the amount and character of the bonds proposed to be issued and the particular purpose therefor. At such election the ballots must contain the words 'Bonds—yes; Bonds—no'; and in voting the elector must make a cross thus 'X' opposite the answer for which he intends to vote.'

Sec. 3455, Revised Codes.

There is no statute against the submission of a double question. [87]

'The test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary

connection with each other; and, if they have not, two purposes cannot be made one by verbal connection.'

Stern v. Fargo, 26 L. R. A. (N. S.) 265, opinion 666;

Blaine v. Hamilton, 116 Pac. 1076, 35 L. R. A. (N. S.) 577.

On page 579 the Court says:

'The true criterion is, are the several parts of the project so related that, united they form in fact but one rounded whole?'

Tullock v. City of Seattle, 124 Pac. 481, opinion, page 483.

The Supreme Court of Montana in a case arising over the submission of an amendment to the constitution providing for the Initiative and Referendum disposes of this contention in *State ex rel. Hay v. Alderson*, 49 Montana, 387. It was contended that two questions were submitted upon two distinct and separate purposes not dependent upon or connected with each other and that they were submitted as one question and for that reason the amendment was void. The Court admitted that 'Persons who approved the Initiative and not the Referendum, or vice versa were obliged to take both or neither.' (Opinion, 407.) And the court said on page 407 'But this circumstance is not fatal if they were both parts of a single plan or general purpose; such divergencies of opinion are conceivable as to any amendment involving particularization. 'The unity of object is to be looked for in the ultimate end, and not in the detail or steps leading to the end.' " (Citing *Lobaugh v. Cook*, 127 Iowa, 181, 102 N. W. 1121.)

The purpose of the \$100,000 Refunding bonds and the \$136,000 New Water Bonds is the same. It is to make the indebtedness for a water system of \$235,000 and to provide for the payment of the principal and interest on both bond issues from a common fund derived from the income from the water plant and the one mill additional tax levy.

Both the Constitution and the Statutes provide that the municipality in creating such a debt must devote the revenues derived therefrom to the payment of the debt.

Sec. 6, Art. 13, Constitution of Montana;

Par. 64, Sec. 3259, Revised Codes of Montana.

The former council had already provided that the income should be devoted to the payment of the former bond issue. In order to provide for the use of this income toward the payment of the new bonds for the water system it is necessary to take up the \$100,000 outstanding Water Bonds and make one issue of \$235,000 for which the fund above mentioned is equally applicable. Whether you call this refunding (for which there is ample authority without submission to the vote of the electors who are also tax payers) or by any other name the object is the same.  
[88]

Bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness.

28 Cyc. 1583.

The indebtedness is not in excess of the Constitutional limitation.

Any indebtedness (except for water and sewer purposes) exceeding three per centum of the value of the taxable property in the city and all bonds and obligations in excess of such amount are void. Cite Sec. 6, Art. 13, Const. of Montana.

The ten per cent in addition to the three per cent is for the sole purpose of providing a water system and sewers. It cannot be used for any other purpose.

Butler v. Andrus, 35 Mont. 575;

Lepley v. City of Fort Benton, 154 Pac. 710-711.

Any indebtedness for general purposes in excess of the three per cent is void. Being void it is in fact no indebtedness and cannot be counted for any purpose whatever.

28 Cyc. 1583.

In Ashuelot National Bank v. Lyon County, 81 Fed. Rep. page 127, the Circuit Court of the Northern District of Iowa in an opinion by Justice Shiras held that bonds of a municipal corporation, which are void because in excess of the constitutional limit of indebtedness, are not to be counted in estimating the indebtedness of the corporation, with reference to the validity of another issue of bonds. It is clear that the new water and sewer bonds are within the additional ten per cent. Any purported indebtedness, including the \$166,000 Funding Bonds, in excess of the three per cent being void cannot be counted so as to reduce the ten per cent additional. To do so would be to allow an indebtedness to be incurred for other purposes than water and sewer purposes in excess of the three per cent and would nullify the

plain intention of the constitution and statutes of the state."

Whereupon Defendants' Exhibit No. 2, being a letter from Pershing, Titsworth & Fry to the plaintiff Sweet, Causey, Foster & Company, dated June 12, 1916, was admitted in evidence, and read as follows:

**Defendants' Exhibit No. 2—Letter, June 12, 1916,  
Pershing, Titsworth and Fry to Sweet, Causey,  
Foster & Co.**

"We have examined with care the memorandum handed us by you containing the notes and authorities given to your Mr. Phillips by the mayor and city attorney of Bozeman, concerning the objections we raised as to the legality [89] of the proposed \$235,000 Waterworks and Refunding Bonds.

First, with reference to the double question. The cases cited in the memorandum are:

Stern vs. Fargo, 26 L. R. A., N. S., 665;

Blaine vs. Hamilton, 116 Pac. 1076; 35 L. R. A., N. S., 577;

Tullock vs. City of Seattle, 124 Pac. 481;

State ex rel. Hay vs. Alderson, 41 Mont. 385;

Lobaugh vs. Cook, 127 Ia. 181.

It seems to be conceded that a double question cannot be submitted as one question. The Statutes of Montana, Section 3455, require the particular purpose, the amount and the character of the bonds to be issued, to be stated in the notice for the election. This certainly requires singleness of purpose in each bond election. A statement of our own views under the circumstances would probably be of little assistance to you, and we will try to confine ourselves to

a consideration of the authorities cited. We cannot, however, see how borrowing money to pay an outstanding indebtedness is in any way related to the question of borrowing money for the purpose of constructing new works.

The case of Stern vs. Fargo, *supra*, we had already cited in support of our position that this was a double question, and therefore the election was invalid. In that case the question was the issuance of bonds for improving a waterworks system and erecting an electric plant in connection with the pumping plant of the waterworks system.

The Court held that this was a double proposition.

The case of Blaine v. Hamilton is from the Supreme Court of Washington. The question there submitted was the issuance of certain bonds for harbor improvements. In the ordinance there was set forth the amount of money proposed to be used in connection with the separate items going to make up the entire harbor improvement. The court held that the purpose of the issuance of the bonds was for harbor improvements and therefore the purpose was single, but the case cites with approval a case formerly decided by the same court, namely, McBryde vs. Montesano, 7 Wash. 69, 34 Pac. 559.

In Tullock vs. City of Seattle, the question submitted was the issuance of bonds for the purpose of acquiring a street railway system. The ordinance submitting the question directed the officers to purchase certain railway tracks if they could under certain conditions, and if not to construct a railway track along said streets. It was contended that this

made the question double. The court held that it was not; that the purpose was to acquire a street railway system. This case also cites with approval the case of *McBryde v. Montesano*.

The case of *McBryde vs. Montesano* was upon the very question here involved, namely, the issuance of bonds a part of which were to be used for the payment or refunding of an outstanding indebtedness, and the balance for new improvements. The court held that this was a double proposition [90] and invalidated the election because it was submitted all as one question and the voters had to vote either for or against the whole proposition. That is the situation in this case. If these Washington cases are to be followed then our position that this election was invalid, is well taken and none of the bonds can be issued thereunder.

It is probably true that the refunding bonds could be issued without any election, and that same situation was considered in the last Washington case cited.

The case cited from the Supreme Court of Montana is upon an entirely different subject, as well as is the case of *Lobaugh vs. Cook, supra*. They involved questions concerning the amendment of the constitution of the state and the claim in the Montana case was made that the initiative and referendum were two different propositions, and therefore the submission of the question was improper under section 9, article XIX of the constitution which is as follows:

‘Should more amendments than one be submitted

at the same election they shall be so prepared and distinguished by numbers or otherwise that each can be voted upon separately.'

The Court holds that the contention is of sufficient merit to completely justify the reference of the question to the Court. The opinion also states that in the case of statutes passed by the Legislative Assembly and assailed as unconstitutional, the question is not whether it is possible to condemn but whether it is possible to uphold, and we stand committed to the rule that a statute will not be declared unconstitutional unless its nullity is placed in our judgment beyond reasonable doubt. The application of this rule is especially commended in the case of an amendment to the constitution solemnly and decisively adopted, the invalidity of which is charged to the method of its submission and made dependent upon a possible theory of its nature.

When we come to a city, however, exercising powers granted to it, or claimed to be granted to it, the rule is that such powers are to be strictly construed. In the Montana case, *supra*, the court finally held that the one subject involved was legislation and therefore it was properly only one amendment.

There seem to be no Supreme Court decisions of Montana passing directly upon the question involved. It was decided in the case of *Carlson vs. City of Helena*, 102 Pac. 39, that article XIII, Section 6 of the constitution requiring a municipality to devote all revenue derived from the waterworks which it is thereby authorized to acquire, to the payment of the debt incurred therefor, does not impli-

edly prohibit the granting of power to a municipality to make additional provision for the payment of the debt. The same case further decides that bonds issued for supplying the city with water are the general obligations of the city, and that the full faith and credit of the city was by law pledged for their payment. Therefore, we can see nothing in the argument that these questions are related because the revenue derived from operating the water system should be applied [91] to their payment. If such an argument were correct, any number of different propositions could be submitted at the same election, because it might be said that they were all to be paid out of general taxation, and that therefore they were all related.

The question submitted contained absolutely two distinct propositions. First, the issuance of bonds to pay the already existing and outstanding debt. Second, the issuance of bonds for extending, improving and enlarging the present waterworks system and acquiring an auxiliary or additional waterworks system from Bozeman Creek.

There is a great deal of room for saying that even the latter part of the question is illegal under the case of *Carlson vs. City of Helena, supra*, upon which point see page 46 of 102 Pacific. The last part of this question would seem to come within the matter condemned in such decision.

After considering these authorities carefully, we still believe firmly that this question was improperly submitted and that valid bonds cannot be issued thereunder.

As to the question of the debt limit. It is true that bonds issued to fund a valid indebtedness neither create any debt nor increase the debt of a municipality, but funding or refunding bonds when outstanding and representing a debt of a municipality are to be taken into consideration when it is proposed to create further indebtedness. Thus the funding of the \$100,000 outstanding waterworks bonds does not create an indebtedness to the extent of \$100,000 but it recognizes the existence of such indebtedness and such indebtedness must be taken into consideration in determining the power of the municipality to create further indebtedness.

The statement of indebtedness of the city contained in the proceedings published by it and marked therein Exhibit "E" and certified by the Clerk to be a true and correct financial statement of the city, includes bonds issued for warrant funding, amount \$166,000. Therefore a person examining this record must consider that such funding bonds are a valid indebtedness of the city. The various items of indebtedness which they go to make up may all have been valid, and yet if it had been attempted to create the total amount of the debt at any one time it could not have been done, so no one can say that the funding bonds are illegal. Their legality depends upon the legality of the debt for which the warrants were issued and for which the funding bonds were issued. If they were issued for an absolutely illegal indebtedness and are themselves illegal it is possibly true that they should not be considered in determining the validity of the funding bonds issued, although this

(Testimony of C. N. Phillips.)

question is not free from doubt.

The federal case cited, namely, Ashuelot National Bank vs. Lyon County, 81 Fed. 187, involved the right of a person to collect bonds after they were issued. It is very doubtful, however, that the City could claim that an obligation voluntarily incurred by it is illegal for the purpose of permitting it to incur further obligations, and especially is this true when the city is seeking to [92] compel a person to purchase bonds and has given him to understand that the prior indebtedness is a valid outstanding indebtedness against the city. Upon the face of the record these funding bonds constitute a legal indebtedness of the city, recognized by it to be such, and therefore must be considered in determining the city's power to borrow further money or to create further indebtedness."

The WITNESS.—I was not present myself at Bozeman at the time of the purchase of the bonds involved in this suit. I think I arrived there June 10, 1916. I went there to confer with the officers of the City of Bozeman for the purpose of trying to straighten the matter out and accept the bonds if possible, and to talk over the subject. At that time Mr. John A. Luce and Mr. Kremer, both being present, explained to me the nature of the \$166,000 of funding bonds issued by the City of Bozeman, July 1, 1914. I do not remember that that subject was gone into in detail, but I think they made some verbal statement of the general character of that indebtedness. So far as I recall I was given to understand

(Testimony of C. N. Phillips.)

that that was a general indebtedness, and not a water or sewer indebtedness. I am not very clear on that. I understood that none of the indebtedness was indebtedness which had been authorized by an election for water or sewer purposes.

Defendants' Exhibit No. 3 is a letter signed by me for my firm, Sweet, Causey, Foster & Company, one of the plaintiffs, and handed to the Mayor of the City of Bozeman, the defendant John A. Luce, personally. Defendants' Exhibit No. 4 appears to be a copy of a letter handed to the City Clerk of the City of Bozeman on the day of its date at the city council meeting.

Whereupon Defendants' Exhibit No. 3, being a letter from the plaintiff Sweet, Causey, Foster & Company, by the witness C. N. Phillips, to the City of Bozeman and the Hon. John A. Luce, Mayor, dated June 10, 1916, which is set out [93] at length in paragraph 6 of the affirmative defense of the defendants in the answer (see page —) was admitted and read in evidence.

Whereupon defendants' Exhibit No. 4, being a letter from the plaintiff Sweet, Causey, Foster & Company, signed by the witness C. N. Phillips, to the City of Bozeman and the Honorable Mayor and City Council, dated June 15, 1916, was admitted and read in evidence as follows:

**Defendant's Exhibit 4—Letter, June 15, 1916, Sweet, Causey, Foster & Co. to City of Bozeman.**

"The writer handed to your Mayor yesterday letter from our attorneys, dated June 12, 1916,

being their reply to the memorandum which he dictated June 10, after submission on that day to your Mayor and City Attorney of the opinion from our Attorneys, dated June 7, 1916, upon the legality of the proceedings furnished us in relation to the proposed \$305,000.00 municipal bonds of the City of Bozeman. Upon their same opinion again expressed in the above-mentioned letter from our attorneys, addressed to the City of Bozeman, John A. Luce, Mayor, and handed personally to the Mayor on that day by the writer, by reaffirming our announcement in that letter of our rejection of the legality of said proceedings.

Neither this letter nor our letter to your City of June 10, 1916, nor our submission of the proceedings to our Attorneys, nor any actions which we have taken or may take, shall be construed as in any manner whatever waiving or prejudicing our position announced in our telegram of May 22, 1916, to your Mayor and confirmed by this and other communications, namely; that Mr. L. E. Torrence had no authority to sign on behalf of our associates and ourselves the purported agreement of May 18, 1916. He had no authority to bid for the said bonds, except strictly subject to the approval of our Attorneys as to the legality.

We now make demands upon you for the prompt return of our certified checks, aggregating \$4,000.00, deposited with the City of Bozeman."

(Testimony of C. N. Phillips.)

The WITNESS.—I appeared before the City Council of the City of Bozeman on June 15, 1916, and was asked by the Mayor whether or not the plaintiff Sweet, Causey, Foster & Company would accept the bonds involved in this suit, and I refused to answer.

And thereupon the plaintiffs rested their case.  
[94]

Whereupon the attorneys for the defendants, to maintain and prove the said issue on their part, offered the following evidence, to wit:

**Testimony of D. S. McLeod, for Defendants.**

D. S. MCLEOD was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I reside at Bozeman, Montana, and occupy the official position of County Clerk and Recorder of the County of Galatin, in which said City is situated. I have occupied that position since January 1, 1917. I am able to give to the Court the equalized assessed valuations of property of all kinds in the City of Bozeman for the years 1898, 1910, 1911, 1912, 1913, 1914 and 1915.

Q. Just state to the court those equalized assessed valuations of property in the City of Bozeman, Montana.

Mr. DAY.—To which we object as immaterial and irrelevant for the reason that these bonds were issued subsequent to the equalized assessment of 1915, and

(Testimony of D. S. McLeod.)

the assessed valuation of that year was contained in the statement furnished the plaintiffs, a copy of which is attached to the complaint of the plaintiffs, and admitted in the answer to be correct, and the assessed valuation of previous years is immaterial to any issue in this case in that these bonds are based upon the last previous valuation. The plaintiff further objects to this evidence for the reason that these facts of which the witness is asked—the condition of the indebtedness of the City at the dates referred to—were not submitted to the bidders in the certified statement of the record of the City and that the purchaser or bidder on the bonds was not bound to take judicial notice of the original indebtedness which formed the basis of the refunding bonds mentioned in the certificate. [95]

Objection overruled.

The WITNESS.—The total assessment of the City of Bozeman, Montana, for the year 1898, after being equalized, was \$1,917,655. For the year 1910 it was \$2,932,125. For the year 1911 it was \$2,971,234. For the year 1912 it was \$2,966,908. For the year 1913 it was \$3,044,198. For the year 1914, it was \$3,147,966. For the year 1915 it was \$3,209,196. For the year 1916 it was \$3,234,136.

**Testimony of John L. Ketterer, for Defendants.**

Whereupon JOHN L. KETTERER, was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

Direct Examination.

The WITNESS.—I reside at Bozeman, Montana,

(Testimony of John L. Ketterer.)

and am now, and since the first Monday in May, 1913, continuously have been, the City Treasurer of the defendant the City of Bozeman. I have in my possession as such officer, and under my control, the records of the City of Bozeman showing its indebtedness of various kinds, which show its financial condition in a general way.

Q. I will ask you to state to the Court the amount of the net indebtedness of the City of Bozeman on the 1st day of January, 1899.

Mr. DAY.—To which we object as immaterial and irrelevant to any of the issues in this case in that the rights of the parties are fixed by the outstanding indebtedness at the time of the passage of the resolution for the issuance of the bonds in controversy.

Objection overruled.

The WITNESS.—The net indebtedness of the City of Bozeman on January 1, 1899, was \$57,912.51. None of that [96] indebtedness was for either water or sewer bonds. It was merely the general indebtedness of the City. The original issue of water bonds by the City of Bozeman were dated January 1, 1899, and the issue was in the amount of \$165,000. The indebtedness which I have given was the indebtedness of the City just before that issue of bonds was made.

The outstanding net indebtedness of the City of Bozeman on January 1, 1911, was \$81,689.40, and that excludes water and sewer bonds. There were never any bonds issued by the City of Bozeman for

(Testimony of John L. Ketterer.)

sewer purposes until the issue in question in this suit, and there were never any water bonds issued by the City of Bozeman other than the issue of \$165,000 that I spoke of of January 1, 1899, besides those which are involved in this suit.

The net outstanding indebtedness of the City of Bozeman on January 1, 1912, was \$116,730.89.

The net general indebtedness of the defendant City of Bozeman on January 1, 1913, was \$80,965.75.

The net general indebtedness of the defendant City of Bozeman on January 1, 1914, was \$159,510.33.

The net general indebtedness of the defendant City of Bozeman on June 30, 1914, was \$166,925.81.

The net general indebtedness of the defendant City of Bozeman on June 30, 1916, was \$180,421.48.

All of the figures given above refer to general indebtedness of the City of Bozeman, and none of them include any water or sewer bonds or indebtedness. The statement of June 30, 1916, includes the issue of funding bonds of July 1, 1914, to the amount of \$166,000. The statement of June 30, 1914, was the net indebtedness of said city just before that issue [97] of bonds. That issue of \$166,000 of funding bonds covered general warrants that were issued from January 3, 1911, up to and including April 30, 1913, and warrants that had been issued after that time to the construction company for street work. In funding those warrants the funding bonds took up both principal and interest of the warrants. The principal of the warrants funded amounted to \$150,855.90, and there was also \$15,720.46 of interest.

(Testimony of John L. Ketterer.)

The warrants funded bore 6% interest. In issuing the funding bonds, the warrants were taken up, principal and interest, and the funding bonds issued in lieu thereof. The warrants funded by said issue of July 1, 1914, were not in any way connected with water or sewer bonds, and did not include any water or sewer indebtedness.

On June 30, 1916, there remained outstanding the \$100,000 of the \$165,000 original issue of water bonds dated January 1, 1899. The rest of that issue had previously been retired. I have already stated that on June 30, 1916, there were no outstanding bonds for sewers, and never had been any. There were no other water bonds outstanding at that time other than those I have mentioned. There was also no water or sewer indebtedness at that date.

#### Cross-examination.

The WITNESS.—I have been City Treasurer since the first Monday in May, 1913. The interest has been regularly paid on this issue of funding bonds. To my knowledge the City of Bozeman has never repudiated the obligation created by this issue of funding bonds, and to my knowledge there has been no suit brought to restrain the payment of interest and principal on any of these funding bonds.

#### Redirect Examination.

The WITNESS.—I am not in a position to know what the City [98] might or might not do in respect to repudiating of indebtedness, or suits

(Testimony of C. A. Spieth.)

brought, or anything of that kind. All I know is what the records in my office show.

**Testimony of C. A. Spieth, for Defendants.**

Whereupon C. A. SPIETH, one of the defendants, was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

The WITNESS.—I reside at Bozeman, Montana, and occupy the position of City Clerk of the City of Bozeman, in the State of Montana. I have occupied that position since the first Monday in May, 1915. I was Deputy City Clerk to the first Monday in May, 1915, when I was appointed City Clerk. I had been Deputy City Clerk for one year previous to that date. I have been either City Clerk or Deputy City Clerk during all of the period of the proceedings and up to the time of the issuance of the bonds in controversy in this case.

The COURT.—When were these proceedings started?

Mr. KREMER.—In February, 1916, I believe.

The WITNESS.—The date of the original sale of the bonds when the plaintiffs in this case purchased them was May 18, 1916. Prior to that date my office had prepared a transcript of the proceedings for the water bonds and proceedings for the sewer bonds, and mailed a copy thereof to each firm of prospective bond buyers requesting them. Among those firms was the plaintiff Sweet, Causey, Foster & Company. I am not able to answer positively when I sent that copy of the transcript of the proceedings, but it was within a period of three weeks prior to the date of

(Testimony of C. A. Spieth.)

the sale, which occurred on May 18, 1916. It is my recollection that I mailed a copy also to the plaintiff C. W. McNear & Company, but as to the plaintiff James N. Wright & Company, I do not remember. I also sent out a financial statement of the [99] City of Bozeman; a copy of such financial statement was attached to each copy of the proceedings. Exhibit "E," which is attached to the original bill of complaint in this suit is a copy of the financial statement then sent out to prospective bond buyers. In explanation of the various indebtednesses listed there, I will say that the \$100,000 of bonds issued for water, 5%, due January 1, 1919, were the bonds that remained of the old water bonds, and those are the \$100,000 of water bonds that were refunded in the issue in question in this case. The \$21,000 is for City Hall funding bonds, 4%, due January 1, 1921. That is what remained at that time of funding bonds for the purpose of building the City Hall. The \$166,000 was bonds issued for funding purposes to fund the general indebtedness of the City of Bozeman. That is the issue of July 1, 1914, referred to by Mr. Ketterer. That issue funded the warrants for general purposes for the City of Bozeman issued between January 3, 1911, and the date of the issuance of those bonds. The other item of \$286,386.13 was for all improvement districts, and that was indebtedness which existed against the several improvement districts for special improvements made under the laws of the State of Montana. Those indebtednesses are a lien upon the property improved,

(Testimony of C. A. Spieth.)

and there is no assessment in the assessment for general taxes for the purpose of retiring that indebtedness, but that is taken care of by the property specially taxed against which it is a lien.

I have my minutes of the meeting of the City Council of the City of Bozeman of May 18, 1916, at which time the bonds were offered for sale. Confining myself to so much of the body of the minutes as has reference to the bonds in question in this [100] suit, those minutes read as follows:

"The Mayor announced that this was the time and place designated by published notice for the auction of the Water and Sewer Bonds and that the regular order of business be suspended and we proceed with the auction, and further announced to the representatives of bidders present, that the successful bidder would be required to enter into a written contract with the City immediately upon the conclusion of the sale of these bond issues, whereby such successful bidder would bind himself to take such bond issue or issues at the amount or amounts bid and that he would have two weeks in which to examine into the legality of the proceedings pertaining to these bond issues and then he must announce his acceptance or rejection thereof, as to the legality of said proceedings. The successful bidder to further agree that if he then assert that said proceedings are illegal, he must in fact, establish such illegality. And if the proceedings are in fact legal and said purchaser shall refuse to accept such bonds at the purchase price thereof, then the City will

(Testimony of C. A. Spieth.)

retain the amounts of the certified checks of the successful bidder as liquidated damages; but if the said proceedings are in fact illegal, the successful bidder must furnish the blank bonds free of expense pay the purchase price thereof.

The Mayor further announced that the successful bidder must furnish the blank bonds free of expense to the City for these issues. He further announced that the bids must be in dollars, representing the amount of the premium bid over and above par. He stated further that the Ordinances prescribing the forms of the bonds, as the same will be passed by the City Council, were on the City Clerk's desk and could be examined by any prospective bidder before the opening of the auction, and further authorized the Clerk to open the sealed bid of the International Trust Company of Denver, which bid, failing to be accompanied by the required certified checks, was ordered not to be considered.

Thereupon the oral auction began.

The following are the bids for Water Bonds:

J. D. Neale, representing Lumbermen's Trust Company of Portland, Ore., par and \$2500.00.

A. R. Clark, representing Harris Trust & Savings Bank of Chicago, Ill., par and \$9590.00.

L. E. Torrence, representing Sweet, Causey, Foster & Co. of Denver, Colo., par and \$9595.00.

For Sewer Bonds:

J. D. Neale, representing Lumbermen's Trust Company of Portland, Ore., par and \$1450.00.

A. R. Clark, representing Harris Trust & Savings

(Testimony of C. A. Spieth.)

Bank, of Chicago, Ill., par and \$2830.00.

L. E. Torrence, representing Sweet, Causey, Foster & Co. of Denver, Colo., par and \$2835.00.

On motion of Alderman Truitt, seconded by Alderman Burke, the bid of Sweet, Causey, Foster & Co., of Denver, Colo., of par and \$9595.00, with accrued interest, for Water Bonds, and par and \$2835.00, with accrued interest, for Sewer Bonds, being the highest bids, were accepted, and the Mayor and City Clerk were authorized to enter into a contract with the bidder as [101] per the instructions and conditions of the auction sale, bidder to furnish Bonds, by the following 'aye' and 'no' vote, those voting 'aye' being Alderman Burke, Fuller, Gibson, Hines, Holm, O'Connell, Pratt and Truitt, those voting 'no,' none."

The WITNESS.—That is all in that set of minutes. Those minutes were approved by the proper officers. I was present at that time, and recall that that is what actually occurred at that time. Copies of the further ordinances to be passed by the City Council to cover such further proceedings as would have to be taken later to complete the issuance of bonds were then in the council room for examination. Mr. L. E. Torrence is the man who represented the plaintiff Sweet, Causey, Foster & Company at that time. He was present in person, and it was he who delivered the two checks for \$2,000 each to me.

Cross-examination.

The WITNESS.—The minutes correctly show what

(Testimony of C. A. Spieth.)

took place at the meeting. There was an auction of the bonds. No other sealed bid was offered except that of the International Trust Company of Denver, mentioned in the minutes. While the minutes only show one bid of each person, I still have the original list in my possession here, where each and every one bid their various amounts. The minutes do not show that; I have that on a separate sheet. There were different bids. They started on par and bid \$5 at a time. The minutes do not show that, but as a matter of fact that did take place.

I made this statement which I mailed to the intended bidders over my signature as City Clerk. The statements therein contained were correct to the best of my knowledge and belief. I stated that no previous issue of bonds had been contested, and that statement is true to the best of my knowledge and belief. There are no records in my office that I know of to show any contest of previous bond issues. To the best of my knowledge, the principal [102] and interest of bonds have always promptly been paid at maturity, and there are no records of the failure of the City of Bozeman to pay the coupons or principal of this issue of \$166,000 of bonds. To the best of my knowledge and belief there is no litigation pending or threatened, affecting the validity of the City's bonds. There are no records in my office of any kind showing that any contest has been commenced or threatened against this issue of \$166,000 of bonds, that I know of.

(Testimony of C. A. Spieth.)

There has not at any time been filed in my office any protest against that issue of bonds, either before or after its issue, and sale, that I am aware of.

I have in my possession the original ordinances fixing the form of the funding bonds, being the \$166,000 issue; the closing paragraph on page 2 reads as follows:

“It is hereby certified and recited that this bond is issued in strict compliance with and conformity to the laws and Constitution of the State of Montana, and that all acts, conditions and things required to be done precedent to the issuance of this bond have been properly and legally done, had and performed, and the full faith and credit of said City are hereby irrevocably pledged to the payment of this bond, according to its terms.”

The bonds issued in pursuance of that ordinance bore the signatures of the Mayor and City Clerk and the seal of the City. The ordinance requires the bonds to be so executed.

#### Redirect Examination.

**THE WITNESS.**—While my minutes do not show it, there was competitive bidding by the bidders whose names are stated in the minutes of May 18, 1916, and that is simply the final result of it. They went from par up \$5, at a time. I couldn't state the second amount but they all originated at par, and competed from there. There was public bidding to reach the results recorded. I have a record showing the figures of the different bids. [103]

**Testimony of Harry D. Kremer, for Defendants.**

Whereupon HARRY D. KREMER was called as a witness on behalf of the defendants, and having been duly sworn, testified as follows:

**Direct Examination.**

The WITNESS.—I resided at Bozeman, Montana, and occupy the official position of City Attorney of said City, which position I have held since May 3, 1915. I was acquainted with Mr. L. E. Torrence, who is spoken of in this case as the representative of the plaintiff Sweet, Causey, Foster & Company, and I have also been acquainted with Mr. C. N. Phillips, the representative of said plaintiff, who has testified in this case, since June 10, 1916. I was present at the meeting of the council of May 18, 1916.

These issues of bonds were naturally largely in the hands of the Mayor, who was an attorney, and myself, and until the day of the sale we had not determined upon what restrictions, if any, we would put on the purchaser of the bonds, or what conditions we would sell them under. On the day of the sale Mr. Clark of the Harris Trust and Savings Bank, a man representing the Lumbermen's Trust Company, of Portland, and the Minnesota Loan & Trust Company, and also Mr. Torrence, representing the Sweet, Causey, Foster Company, wanted to know if we were going to sell the bonds conditionally or unconditionally as to legal proceedings; and after the Mayor and the finance committee and I had a conference, and after I had been informed by Mr. Torrence, a man representing the Lumbermen's

(Testimony of Harry D. Kremer.)

Trust Company and also Mr. Clark, of the Harris Trust & Savings Bank, that all three of them had had opinions from their attorneys, and that they were ready to make unconditional bids for the bonds, we felt that if we did not put any restrictions on that we would probably [104] get a better price. Mr. Clark had an opinion with him from Messrs. Wood & Oakley, the law firm mentioned by Mr. Phillips. It was on their stationery, and the same stationery that appears in one of these exhibits. I have not the original of that in my possession, but I have had it in my possession, and had opportunity to examine it. It was signed by the same Mr. Wood. I returned it to Mr. Clark. The letter was addressed to the Harris Trust & Savings Bank, in which Mr. Wood stated on behalf of the firm of Wood & Oakley that the proceedings pertaining to these two questions were lawful, and he would approve them, providing the proceedings showed that the County Attorney of Gallatin County had given his approval of the proceedings, and providing the proceedings showed that the offer to sell bonds had been made to the State Land Board, and providing the ordinance prescribing the forms of the water bonds divided them into two different forms of bonds, one for refunding and one for the \$135,000 additional indebtedness. And taking into consideration all of those conversations, and believing that we would get better bids by having no restrictions, the announcement was made as the clerk read it.

I prepared the transcripts that were sent to Sweet,

(Testimony of Harry D. Kremer.)

Causey, Foster & Company, and which they acknowledged the receipt of. Those transcripts had with them the necessary letter by the County Attorney, made as an original, and also had the refusal of the State Land Board to purchase any of these issues, and the forms of bonds were subsequently drawn according to the ideas expressed by Mr. Wood, or Wood & Oakley. There was nothing said in that conversation on May 18, 1916, as to the \$166,000 of funding bonds except by the representative of the Minnesota Loan & Trust Company. Mr. Torrence was not present at that time. The matter was not raised nor discussed with [105] Mr. Torrence. Mr. Torrence told me, "I have an opinion from the attorney that they are valid, and I am ready to bid on these bonds." They had then had this financial statement in their possession at least two weeks.

The night after the sale, while the Council was in session, I drew this contract. Mr. Torrence and I had a conversation. We talked about what should be said in the contract, or what should not be. He indicated what he would like to have in the transcript, so that it would be complete, and what he asked for was furnished later by me in the transcript. I got up the transcript, and of course it was certified to by the City Clerk. That was the last conversation I had with Mr. Torrence, but on June 10 I had a conversation with Mr. Phillips, and had other conversations with him on June 14, and June 15, 1916. On June 10, following a telegram

(Testimony of Harry D. Kremer.)

from Sweet, Causey, Foster & Company, saying he would come to Bozeman on that day to talk to us about these bonds, he came to the office of the Mayor, and the Mayor 'phoned me and I went up. He had with him this opinion of Pershing, Titsworth, & Fry, dated June 7, and we explained to him as fully as could be explained the basis of the \$166,000 indebtedness, and that was gone into in detail. We told him that none of it was for water or sewer purposes. We then drew that brief and gave it to him, with the request that he send it to Sweet, Causey, Foster & Company, and that they give it to their attorneys, and we felt that they would be convinced of the legality of the proceedings, after they were informed as to the exact basis of the \$166,000 indebtedness. Then Mr. Phillips went to Billings for several days, and came back on the 14th, and had with him the reply to our brief—a reply, you might say, to our conversation with him—and notwithstanding our [106] explanation of the \$166,000 indebtedness, their attorneys assumed that that was a valid indebtedness of the City. On June 15, we had a council meeting, and Mr. Phillips was present and addressed the council, and when we asked him whether he wanted the bonds, or would take them, he refused to say. I have not stated the conversations with the various representatives of the plaintiff Sweet, Causey, Foster & Company in full, but have stated everything that now appears to me to be pertinent to this matter.

I have personal knowledge of the subsequent sale

(Testimony of Harry D. Kremer.)

of the bonds involved in this case. Within a few days following this meeting of the City Council attended by Mr. Phillips, I sent telegrams to a number of bond houses, asking them to make an *officer* for these bonds, stating that they had been rejected by Sweet, Causey, Foster & Company, and I had various replies. The reply that seemed most likely to produce results was one from Harris Trust & Savings Bank, of Chicago, offering par and 3%, subject to acceptance within twenty-four hours. I notified the Councilmen, and the Mayor was away. The acting Mayor called a special meeting of the Council for two o'clock that afternoon, and we sold the bonds to the Harris Trust & Savings Bank, and wire them to that effect. We went ahead then to get up the transcripts and attend to all of that business, and they wrote back that they understood their attorneys had practically approved of the entire issue. While Mr. Luce and I were in Butte on the 20th of July, at the hearing relative to the injunction in this case, the Harris Trust & Savings Bank telegraphed to the City Clerk to have a copy of the pleadings and information relative to this case, and he, not having them, simply wired them a statement of the matter, [107] and, in short, when they had full knowledge of the case, they would not fulfill their part of the contract and take the bonds, without a final judgment in this case. They took considerable time negotiating back and forth, and finally about the 1st of September, 1916, we broke

(Testimony of Harry D. Kremer.)

off negotiations entirely with the Harris Trust & Savings Bank.

I went to Butte then within a few days, and sold the bonds to James A. Murray at par, I think on the 3d of September. I was representing the City of Bozeman. The bonds were actually delivered to James A. Murray of Butte, and the money was paid to the city.

Mr. Luce and I repeatedly said to Mr. Phillips that we would do anything that would make these bonds legal that we could do, but the things they were asking of us would result in making an entire new issue of bonds, and were not to cure any alleged invalidity of the bonds. We made that offer at various times in conversations we had with Mr. Phillips.

Mr. PATTEN.—At this time I ask leave to amend paragraph 14 of the answer, on page . . . . , by striking out from the last of that paragraph the following: "The said City of Bozeman has sold said bonds to the Harris Trust & Savings Bank, of Chicago, Illinois, and said bonds have been printed and will be signed and delivered to and accepted by said Harris Trust & Savings Bank as legal, upon the proceedings claimed to be illegal by plaintiffs herein," and in lieu thereof ask to insert: "The said City of Bozeman has sold said bonds to James A. Murray, of Butte, Montana, and said bonds have been printed, signed and delivered, and accepted by said James A. Murray, as legal, upon the proceedings claimed to be illegal by plaintiffs herein." Also to amend para-

(Testimony of Harry D. Kremer.)

graph 7 of the affirmative defense of the defendants by striking out from the last of said paragraph the following: "Proceeded [108] to and did sell the said bonds to the Harris Trust & Savings Bank, which bank has agreed to accept said bonds as legal," and to insert therein in lieu of the matters stricken out the following: "Proceeded to and did first sell the said bonds to the Harris Trust & Savings Bank, which bank agreed to accept said bonds, but did not complete the purchase thereof, and thereafter sold and delivered said bonds to James A. Murray, of Butte, Montana, who accepted the said bonds as legal." I do not think this a very material amendment, but in view of the testimony, and as a part of the history of the case, it probably will be well to have the correct facts stated.

Mr. DAY.—To which amendments plaintiffs object, so far as any sale to James A. Murray is concerned, for the reason that the testimony shows the sale to Murray was pending, but there is no authority in law for the sale of municipal bonds at private sale, and the bonds in the hands of Mr. Murray are absolutely void, they are still in the possession of Bozeman, it appearing that the supposition that the bonds had been sold to Harris is incorrect.

The COURT.—The objection will be overruled, *pro forma*, and the amendments allowed. If not entitled to any consideration by the Court, it will receive none, and we will have it all in the record.

Mr. PATTEN.—You make no objection to the

(Testimony of Harry D. Kremer.)

form in which I offer the amendments.

Mr. DAY.—Oh, no.

Cross-examination.

The WITNESS.—Some of the things requested of us were things we could not do, and the others were things that if done would tend to validate the bonds. We could not reduce the city indebtedness as requested. We could have disregarded the elections [109] we had, and have had other elections. We didn't believe from a legal standpoint that anything would be gained by it. We declined to do that because we didn't think it was necessary. The statute of Montana does not prescribe any form of contract following the auction sale of bonds. It does not prescribe any auction contract at all in specific terms, to my knowledge. The Supreme Court of Montana has held that an auction may consist of several offers, without the presence of the bidders.

I have in my possession a letter of August 7 written to the City of Bozeman by Mr. Wood, declining to *approving* these bonds. I haven't here the letter from the Harris Trust & Savings Bank of August 3 declining to accept the bonds, but we have it in our file. I know the contents of it in a general way. I know that Mr. Wood declined to approve the bonds after the Harris Trust Company had bought them. The proposition submitted to Harris & Company was not whether they would take the bonds if this suit was dismissed; it was an out-and-out sale to them—an out-and-out offer by telegraph to buy them at par

(Testimony of Harry D. Kremer.)

and 3%. We held a council meeting without twenty-four hours, and accepted their offer. Mr. Wood did not state that he declined to endorse the validity of these bonds even if this suit were dismissed and the allegations in this complaint withdrawn. The Harris Company said they would consummate their contract to purchase the bonds, provided a final judgment of this case were rendered. I hadn't any conversation with them myself personally. [110]

I know of no proceedings to set aside this issue of \$166,000 of bonds.

And thereupon the defendants closed their case, and this concluded the testimony in the case.

The foregoing is presented as a statement of the evidence taken at the trial of said cause.

H. D. KREMER,  
GEORGE Y. PATTEN,  
Attorneys for Defendants.

Service of the above statement of the evidence is acknowledged, and copy received, this 10th day of March, 1917, and we hereby consent that the same may be settled as the statement of the evidence as of this date.

DAY & MAPES,  
Attorneys for Plaintiffs.

**Order Approving Statement of Evidence, etc.**

The foregoing statement of the evidence contains all of the testimony, oral and documentary, introduced at the trial of said cause, is full, true and com-

*Sweet, Causey, Foster & Company et al.* 133

plete, and is approved this 14th day of March, 1917.

GEORGE M. BOURQUIN,

U. S. District Judge for the District of Montana.

Filed Mar. 14, 1917. Geo. W. Sproule, Clerk.

[111]

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That on February 27, 1917, a Citation was duly issued herein, which said original Citation is hereto annexed and is in the words and figures following, to wit: [112]

*In the District Court of the United States, District of Montana, Helena Division.*

IN EQUITY.

SWEET, CAUSEY, FOSTER & COMPANY, a Corporation, et al.,

Plaintiffs,

vs.

CITY OF BOZEMAN et al.,

Defendants.

**Citation on Appeal.**

United States of America,—ss.

To Sweet, Causey, Foster & Company, a Corporation,  
James N. Wright & Company, a Corporation,  
and C. W. McNear & Company, a Corporation,  
GREETING:

You are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 29 day of March, A. D.

1917, pursuant to an order allowing an appeal filed and entered in the clerk's office of the District Court of the United States for the District of Montana, upon a final decree signed, filed and entered on the [113] 14th day of February, 1917, in that said suit being in equity No. 77, wherein you are the plaintiffs and appellees, and City of Bozeman, a corporation, John A. Luce, Mayor of the City of Bozeman, and C. A. Spieth, Clerk of the City of Bozeman, are defendants and appellants, to show cause, if any there be, why the decree rendered against the said appellants, as in said order allowing appeal mentioned, should not be corrected, and why justice should not be done to the parties in that behalf.

Feb. 27, 1917.

GEO. M. BOURQUIN,

U. S. District Judge of the District of Montana.

Due service of the above and foregoing Citation on Appeal is acknowledged, and copy received, this 1st day of March, 1917.

DAY & MAPES,  
Attorneys for Plaintiffs. [114]

[Endorsed]: No. 77. In the District Court of the United States, District of Montana, Helena Division. Sweet, Causey, Foster & Company, a Corporation et al., Plaintiffs, vs. City of Bozeman et al., Defendants. Citation on Appeal. Filed Mar. 1st, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy.  
[115]

That on March 13, 1917, Praeclipe for Transcript was duly filed herein, in the words and figures following to wit:

(Title of Court and Cause.)

**Praeclipe for Transcript of Record.**

To the Clerk of the Above-entitled Court:

You will please incorporate in the transcript on appeal to the Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, the following portions of the record, to wit:

The Bill of Complaint; the Answer; the Statement of the Evidence; the Opinion and Decree of the Court; the Petition for Appeal; the Assignment of Errors; Bond on Appeal; the Citation on Appeal; and the Clerk's Certificate.

H. D. KREMER,  
GEORGE Y. PATTEN,  
Attorneys for Defendants.

Service of the above and foregoing Praeclipe acknowledged, and copy received, this 10th day of March, 1917.

DAY & MAPES,  
Attorneys for Plaintiffs.

Filed Mar. 13, 1917. Geo. W. Sproule, Clerk.

**Certificate of Clerk U. S. District Court to Transcript  
of Record.**

United States of America,  
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 117 pages, numbered consecutively from 1 to 117, inclusive, is a full, true and correct transcript of the pleadings, orders, opinion of the Court and decree, and all other proceedings had in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Fifty 95/100 Dollars (\$50.95), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Great Falls, Montana, this 21st day of March, A. D. 1917.

[Seal]

GEO. W. SPROULE,

Clerk. [117]

[Endorsed]: No. 2959. United States Circuit Court of Appeals for the Ninth Circuit. City of Bozeman, a Corporation, John A. Luce, Mayor of the City of Bozeman, and C. A. Spieth, City Clerk of the City of Bozeman, Appellants, vs. Sweet, Causey, Foster & Company, a Corporation, James N. Wright & Company, a Corporation, and C. W. McNear & Company, a Corporation, Appellees. Transcript of the Record. Upon Appeal from the United States District Court for the District of Montana.

Filed March 24, 1917.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.



No. 2959

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# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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CITY OF BOZEMAN, a Corporation, JOHN A. LUCE,  
Mayor of the City of Bozeman, and C. A. SPIETH,  
City Clerk of the City of Bozeman,

Appellants,

vs.

SWEET, CAUSEY, FOSTER & COMPANY, a Corporation,  
JAMES N. WRIGHT & COMPANY, a Corporation,  
and C. W. McNEAR & COMPANY, a Corporation,

Appellees.

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## BRIEF OF APPELLANTS.

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H. D. KREMER,  
GEORGE Y. PATTEN,  
Solicitors for Defendants and Appellants.

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Filed

MAY 3 - 1911

F. D. Monckton,



No. 2959

# United States Circuit Court of Appeals FOR THE NINTH CIRCUIT

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CITY OF BOZEMAN, a Corporation, JOHN A. LUCE,  
Mayor of the City of Bozeman, and C. A. SPIETH,  
City Clerk of the City of Bozeman,

Appellants,

vs.

SWEET, CAUSEY, FOSTER & COMPANY, a Corporation,  
JAMES N. WRIGHT & COMPANY, a Corporation,  
and C. W. McNEAR & COMPANY, a Corporation,

Appellees.

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## BRIEF OF APPELLANTS.

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This is a suit in equity to compel the appellants to return two certified checks aggregating \$4,000, deposited as earnest money on the purchase by appellees of certain municipal bonds. The bonds in controversy consist of an issue of the City of Bozeman of water works bonds aggregating \$235,000, and sewer bonds aggregating \$70,000. The bill of complaint, as filed (Record, p. 2), was one for an injunction to restrain the city from selling and delivering to others than the appellees the issue of bonds sold by appellants to appellees, if the bonds were to be held valid, or from negotiating or cash-

ing the certified checks aggregating \$4,000, if they were held to be invalid. The application for a temporary injunction against the sale of the bonds was denied, and the appellants were directed to hold the checks for the final hearing, which was done. After the hearing on the temporary injunction, and prior to the trial, the appellant City of Bozeman sold the bonds to James A. Murray of Butte, the appellees having refused to take them. The question of enjoining the sale of the bonds has, therefore, been eliminated from the case.

Both the water works bonds and sewer bonds were issued pursuant to the authority of a special election held at the same time as the general election for the City of Bozeman, on the 3d day of April, 1916. Separate notices of election were given, which were identical in terms except in their descriptions of the denominations and amounts of the bonds, and the purposes for which they were to be issued. The notice of election for the water works bonds was as follows:

“Said special election will be held for the purpose of submitting to the taxpayers, as defined by Sections 468 and 469 of the Revised Codes of Montana of 1907, who are also possessed of the qualifications of electors in said City of Bozeman, the question of the said city issuing Water Works Bonds upon the credit of the said city in the sum of \$235,000.00, the proceeds from the sale thereof to be used as follows: \$100,000.00 for redeeming the present outstanding Water Works Bonds and the balance in extending, improving and enlarging the present water works system and acquiring an auxiliary or additional water works system from Bozeman Creek for the City of Bozeman.” (Record, pp. 5, 6.)

The bonds were sold at public auction, and the appellees being the highest and best bidders, were awarded the bonds, and thereupon deposited two certified checks for \$2,000 each, as security for their completing the purchase of the bonds. A

written agreement was entered into between the appellants and appellees, a copy of which is set out in the bill of complaint (Record, p. 12), in which it was provided that if upon examination the appellees asserted that the proceedings leading up to the issuance of the bonds were illegal, they must establish such illegality; that if the proceedings were, in fact, legal, and the appellees refused to accept the bonds, then the appellant the City of Bozeman was to retain the amount of the certified checks as liquidated damages; but, if the proceedings were, in fact, illegal, then the appellees were to be under no obligation to take the bonds, and the checks which they deposited were to be immediately returned to them.

No complaint was made by appellees in their bill of complaint, or elsewhere, as to the legality of the proceedings at the election, or that the bonds were not authorized by a majority of the votes cast. The proceedings subsequent to the election, having to do with the issuance of the bonds, were also not questioned by them. The appellees, however, refused to accept the bonds, claiming that they were illegal for the reasons set forth in the bill of complaint (Record, p. 18), as follows:

“(a) That at the time of the submission of the question of the issuance of said bonds to the taxpayers affected thereby said City of Bozeman was indebted in excess of three per cent of the taxable value of the property of said city as the same appeared upon the assessment roll of said city for the year 1915, which fact will more fully appear by reference to the financial statement of said city attached hereto and heretofore referred to as Exhibit E; that the question of extending the limit of indebtedness of said city for the purpose of procuring a water supply or the construction of sewers in excess of the three per cent limit of the taxable property and within the limit of ten per cent of the taxable property, as

provided by the Constitution of the State of Montana, was never submitted to the taxpayers affected.

“(b) That the issuance of the \$235,000 of Water Works Bonds and \$70,000 of Sewer Bonds would in fact increase the indebtedness of said city beyond the thirteen per cent limit of indebtedness as fixed by the Constitution of the State of Montana, assuming that the question of extending the limit of indebtedness beyond the three per cent limit had been properly submitted to the taxpayers.

“(c) That the question of the issuance of the \$235,000 of Water Works Bonds, of which \$100,000 were to be used for funding bonds and \$135,000 for the construction of additions to the water supply, was a double question, and was submitted to the taxpayers of said city as one question, and that the taxpayers affected thereby were never permitted the opportunity of expressing their will upon the two separate questions.”

The cause came on for trial before the Honorable George M. Bourquin, District Judge, at Helena, Montana, on January 10, 1917. (Record, p. 82.) Thereafter on February 13, 1917, the court entered its finding in favor of the appellees, and filed a memorandum decision (Record, p. 72), holding the issue of bonds illegal upon the first ground stated above, to-wit: that the notices of election were insufficient in that the question of extending or exceeding the three per cent limit of indebtedness was not submitted to and voted upon by the electors. The court did not discuss the other grounds of illegality alleged, but indicated in his opinion that they were, in part, at least, untenable. A decree (Record, p. 75), was accordingly entered in favor of the appellees, directing the return of the certified checks deposited with the appellant City of Bozeman.

The testimony taken at the trial, though brief, is pertinent only to the other grounds of alleged illegality. The questions

presented by the decision of the lower court are law questions, based upon the reading of the notices of election.

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## SPECIFICATION OF ERRORS.

### I.

The District Court for the District of Montana erred in holding that the question of the City of Bozeman incurring bonded debts extending or exceeding the three per cent limit was not submitted to and voted upon by the electors of said City for the reasons:

- (1) Under the laws of Montana the question to be submitted, and which was submitted, was whether the bonds should be issued, and in voting in favor of issuing the bonds, the electors thereby voted to extend the three per cent limit.
- (2) The statutes of Montana define how the question of extending or exceeding the three per cent limit of indebtedness of cities for water and sewer purposes shall be submitted to the electors, the form of submission being prescribed in Secs. 3454, et. seq., Rev. Codes of Mont. of 1907.
- (3) The questions to be voted upon by the electors, as stated in the Council's resolutions to submit to such electors the question of said bonds, the notices of election, the ballots and the subsequent ordinances for the issue of the bonds, conformed to and complied with the provisions of said statutes.

### II.

The said District Court erred in holding that the issues of bonds in question herein, to-wit, the water works bonds of said city aggregating \$235,000, and the sewer bonds of said city aggregating \$70,000, would be or were illegal, for the same reasons.

### III.

The said District Court erred in finding for the appellees and against the appellants, for the same reasons.

### IV.

The said District Court erred in making and entering its decree herein on February 14, 1917, in favor of the appellees and against the appellants, for the same reasons.

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## ARGUMENT.

### I.

*The question to be submitted, and which was submitted, was whether the bonds should be issued, and in voting in favor of issuing the bonds, the electors thereby voted to extend the three per cent limit.*

It will be observed that the lower court held that the notices of election should have submitted the proposition as to whether the three per cent debt limit should be extended or exceeded for the purpose of issuing the bonds, and were fatally defective for not doing so. It is not contended by appellees that there should have been two separate elections, (1) for the purpose of taking the will of the electors as to whether the debt limit should be extended beyond three per cent for the purpose of issuing the water and sewer bonds, and (2) for the purpose of obtaining a vote on the question as to whether the bonds should be issued; nor is it claimed that these questions should have been separately stated in the notice of election, or upon the ballot. It is only insisted by appellees, and held by the District Court, that the notices of election, to have been legal and valid, must have advised the electors that

the three per cent limit was to be extended, if the proposed bonds were issued.

The Constitution of Montana, Art. XIII, Sec. 6, provides as follows:

"No city, town, township or school district shall be allowed to become indebted in any manner or for any purpose to an amount, including existing indebtedness, in the aggregate exceeding three per centum of the value of the taxable property therein, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness, and all bonds or obligations in excess of such amount given by or on behalf of such city, town, township or school district shall be void. Provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the question to a vote of the taxpayers affected thereby, when such increase is necessary to construct a sewerage system or to procure a supply of water for such municipality which shall own and control said water supply and devote the revenues derived therefrom to the payment of the debt."

Pursuant to this constitutional provision, the Legislature, (Rev. Codes of 1907, Sec. 3259, Sub.-div. 64) has conferred upon city councils the power:

"To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, water works, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds; provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness, must not at any time exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by

the last assessment for State and County taxes, provided, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply or sewerage system, until the proposition has been submitted to the vote of the taxpay-  
ers affected thereby of the city or town and the majority  
vote cast in favor thereof, and further provided, that an  
additional indebtedness shall be incurred, when necessary,  
to construct a sewerage system or procure a water supply  
for the said city or town which shall own or control said  
water supply and devote the revenue derived therefrom  
to the payment of the debt; the additional indebtedness  
authorized, including all indebtedness heretofore con-  
tracted, which is unpaid or outstanding, for the construc-  
tion of a sewerage system, shall not exceed ten per centum  
over and above the three per cent, heretofore referrd to,  
of the total assessed valuation of the taxable property of  
the city or town as ascertained by the last assessment for  
State and County taxes; and, provided further, that the  
above limit of three per centum shall not be extended,  
unless the question shall have been submitted to a vote  
of the taxpayers affected thereby and carried in the af-  
firmative by a vote of the majority of said taxpayers who  
vote at such election.”

In the opinion of the District Court, it is said:

“Although the statute does not define how the ques-  
tion shall be brought home to the electors, it is intended  
to subserve a useful purpose, and contemplates an intel-  
ligent vote by an electorate having knowledge that it is  
to determine not only that a bonded debt shall or shall  
not be incurred, but also that it is a proposed bonded  
debt extending or exceeding the three per cent limit.  
*The question that the statute directs shall be submitted is not, shall the city incur a bonded debt, but is, shall the city incur a bonded debt extending or exceeding the three per cent limit?* To vote for the first is not to vote for the last. Electors would vote for the first encumbering their property not more than three per cent, who would not vote for the last, incumbering it more than three per cent. And notice to vote upon the question of proposed bonded

debts is not notice to vote upon the question of proposed bonded debts extending or exceeding the three per cent limit." (Record, p. 75.)

Thus the court interprets the language of the constitutional provision "that the Legislative Assembly may extend the limit mentioned in this section by authorizing municipal corporations *to submit the question* to a vote of the taxpayers affected thereby" and the language of the statute, above quoted, "that the above limit of three per cent shall not be extended unless *the question shall have been submitted* to a vote of the taxpayers affected thereby" to mean that the *question* referred to is the question of extending the debt limit. If the language of these provisions is to be thus taken literally, it would seem to result that the **only** question to be submitted is, shall the debt limit be **extended**, and that it would be left to the council to deal with the question as to what it would do in the way of creating the indebtedness after the limit was thus extended.

This interpretation, however, does not give effect to the language of the Constitution, that the *legislative assembly may extend the limit*; and ignores the provisions of Section 3455, Revised Codes of Montana, which prescribes the form of submission. This view, moreover, is in conflict with the interpretation of these provisions which has been adopted by the Supreme Court of Montana.

In the case of *Carlson v. City of Helena*, 39 Mont. 104, it was contended that the power of a city to incur an indebtedness does not embrace authority to issue bonds, and that there must be a submission of the two questions to confer authority upon the city to make a valid issue of bonds. The court, at page 104, said:

"It is said that the authority of the city to incur an indebtedness does not include an authority to issue bonds,

and therefore that two elections were necessary to authorize the proposed issue, (1) to extend the limit and incur the indebtedness, and (2) to issue bonds. It is not necessary to inquire whether the power conferred upon a municipality to incur indebtedness does not imply the additional power to issue evidences thereof, in the form of negotiable securities. Here the authority is expressly given. The Constitution does not prescribe the mode by which the legislature may authorize submission to the taxpayers of the question whether an indebtedness shall be incurred. The legislature, therefore, was free to prescribe such method as it chose. The method of procedure and the form of the question to be submitted by the council are prescribed in Sections 3454, et. seq., Revised Codes. The form of the submission requires the electors to vote 'Yes' or 'No' upon the question whether bonds shall be issued; so that, in voting upon this question, they authorize the debts to be incurred by the issuance of the bonds. The contention must be overruled."

In the later case of *Arnold v. Miles City, et al.*, 46 Mont. 481, the court said:

"When the taxpayers of Miles City voted in favor of issuing bonds to construct a sewerage system and procure a water supply, they thereby voted to extend the three per cent limit for those purposes, and the limit was thereby extended."

The opinion was expressed in the decision of the lower court that this question has not been passed upon by the Supreme Court of Montana. Such also seemed to be the position of appellees in the court below, as the only case cited by them in this connection was the *Carlson* case, above, and while it was not urged that this was an authority in support of their contention, it was suggested that this case presented a method of submitting the question involved which had been approved by the Supreme Court of Montana, because in that case the notice stated that the election was to be held "for the

purpose of ascertaining the will of the taxpayers to be affected thereby, and that authority may be given and power conferred upon the city council to increase the indebtedness of said city over and above the three per cent limit fixed by law by the issuance" of the bonds described therein.

It is submitted that the language of the court in the *Carlson* case, as well as in the later case of *Arnold v. City of Miles City*, is not to the effect that the question of extending the limit of indebtedness must be submitted, but quite clearly indicates the view that such submission is not necessary.

As stated above, it is not contended by appellees, nor did the lower court hold, that there should be a separate submission, even at the same election, of the question of extending or exceeding the debt limit, but only that the question of extending or exceeding the debt limit shall be coupled with the question of issuing the bonds for the information of the elector, and as a part of the question to be voted upon.

It would seem that if the question of extending the three per cent limit of indebtedness were a question in itself, and one which must be presented to the electors, it should be presented to them as a separate question so that they might vote upon it separately. In the *Carlson* case, the Supreme Court of Montana does not say that the submission of the question of extending the debt limit as a part of the question to be voted upon saved the notice of election, and made the proceedings valid. The court does not intimate that the inclusion of that question had any effect upon the validity of the notice, or that the fact of such inclusion in any way influenced its opinion. In that case the court squarely held, not only that two elections were not necessary, but that the question of issuing the bonds included the question of extending the limit

of indebtedness for the purpose, without being stated; that the legislature was free to prescribe such form of submission as it chose, and that the method which it had prescribed was the one to be followed. The legislature has not required that the question of extending the limit of indebtedness shall be submitted, either as a part of the main question of issuing the bonds, or as a separate submission.

But even if it can be said that the *Carlson* case goes no farther than to hold that no separate submission need be made of this question, we yet submit that the court disposed of the question as it is here raised, because it is, in effect, the same question; and furthermore, that in the *Arnold* case, the language used is so unequivocal as to leave no room for doubt.

The holding of the lower court, and the contention of appellees as to the question to be submitted, seems to rest solely upon the argument that the elector is entitled to know—and that the constitutional and statutory provisions quoted above intend that he shall be informed—that the creation of the proposed indebtedness will involve an increase or extension of the existing municipal indebtedness beyond the three per cent limit; that, knowing that the indebtedness to be incurred would exceed the three per cent limit, the voter might oppose a proposed bond issue which otherwise he would favor.

Manifestly, this argument attaches altogether too much significance to the setting of the limit for general purposes at *three per cent*. The three per cent limit is an arbitrary one established by the constitution for the sole purpose of preventing cities and towns from indulging in extravagance in municipal expenditures, beyond current revenues. It declares that to be a sufficient latitude for indebtedness for general purposes, but regards water and sewer facilities of such great

value to a community that it not only permits additional indebtedness for these purposes, but refrains from setting any limit to the increase to be allowed, leaving it to the legislature to set such limits, with the consequent result that such limits may be easily changed from time to time.

It is submitted that the proper interpretation is that the framers of the constitution intended to charge themselves and the legislative assembly only with the duty of establishing limits to operate as restraints upon the cities and towns, and left it to the electors to approve or disapprove of the creation of any particular indebtedness within those limits. In other words, that the *limits* are set by the constitution and statute, and that the voter has nothing to do with them; but that the question of *incurring indebtedness*, within those limits, is left to be determined by the cities and towns, through their councils and electors.

So far as the elector is concerned, there can be no special reason why he should be advised only when the three per cent limit is being exceeded, and then be given information of the bare fact itself. If we are to assume that he should be informed on the subject—and that the constitution and statute requires that he should be—it is evident that if the information is to be of any value to him, or serve any purpose, he should be informed in each instance as to the percentage of debts then outstanding, and the exact percentage of the proposed increase or extension. From his point of view, he would be as much concerned to know that the proposed debt would exceed two, four or six per cent of the value of property in his community as to know that it would exceed three per cent thereof. But, as a matter of fact, percentages would mean little or nothing to him, and the constitution and statute do not

either declare or imply that they shall be presented to him. What the elector is interested in knowing is how much money is to be borrowed, and for what particular municipal improvement—and that is what the constitution and statute have required shall be submitted to and voted upon by him. The question of creating the particular indebtedness, and not of extending the debt limit, is the vital and important thing.

Cases involving the precise point under consideration, so far as our search discloses, have been exceedingly rare. While the courts have frequently considered the question as to whether the particular submission under review involved more than one purpose, which should be voted upon separately by the electors, they do not seem to have regarded this point as important, and in almost all of the cases it will be found that the submissions have simply stated in concise terms the amount and purposes for which bonds are to be issued, without mention of the fact that any debt limit was to be exceeded.

In the case of *Kerlin v. City of Devils Lake*, 141 N. W. 756, (N. D.), the question was raised, although in a different way from that in which it is presented here. The ballot submitted two questions: (1) whether the debt limit should be increased as authorized by the constitution and statute; and (2) whether bonds therefor in an uncertain amount "not to exceed \$33,000" should be issued, all for the purpose expressed of "establishing a municipal light plant and paying therefor." It was held that the constitution and statutes in that state contemplate two separate elections, although they may be consolidated and held as one, when a separate vote on each question is permitted. (It will be seen that this decision is in direct conflict with the *Carlson* case, in which the contrary is held to be the law in Montana.) The court held

that the amount must be certain, and that the uncertainty resulting from the use of the words "not to exceed \$33,000" vitiated the election on that question. The court then considered the question as to whether this would invalidate the election on the other question submitted to it, and held that it would not. In discussing the latter question, the court used the following language, which seems to be directly in point here, although opposed to the assumption of the court that the questions should be separately submitted:

"Every voter was charged by law with knowledge that the primary purpose of the election was to increase the debt limit, and must have known, as a matter of law, that without that increase no bond issue could be authorized. Hence the bond issue, being dependent for validity wholly upon the constitutional increase of the debt limit, in no wise could affect the decision of or influence the voters in voting upon the question of whether the constitutional increase should be had or not. *To illustrate, if the voter was in favor of the issuance of the bonds, he must also be in favor of increasing the debt limit, otherwise we must presume him to be ignorant of the law.* So, too, if the voter be favorable to both issuance of bonds and increase of the debt limit he has but expressed his opinion when he votes affirmatively on both propositions at once."

In the case of *City of Oxnard v. Bellah*, 130 Pac. 701, (*Cal. App.*), the submission was similar to that in the case at bar, the proposition being "Shall bonds of the City of Oxnard in the sum of \$30,000 be issued for the purpose of the acquisition, construction and completion by said City of Oxnard of a certain municipal improvement, to-wit, a municipal lighting system?" The court held that it was not necessary to separately submit the proposition of incurring a debt—that the authority to issue the bonds necessarily carried with it the authority to incur the indebtedness.

## II.

*The Statutes of Montana Define the Method of Submitting the Question of Extending or Exceeding the Three Per Cent Limit of Indebtedness of Cities for Water and Sewer Purposes to the Electors.*

In the *Carlson* case, *supra*, the Supreme Court of Montana, after pointing out that the Constitution of Montana does not prescribe the mode by which the legislature may authorize the submission to taxpayers of the question whether an indebtedness shall be incurred, but left the legislature free to prescribe such method as it chose, said:

“The method of procedure and the form of the question to be submitted by the council are prescribed in Sections 3454, et. seq., Revised Codes. The form of the submission requires the electors to vote ‘Yes’ or ‘No’ upon the question whether bonds shall be issued; so that in voting upon this question they authorize the debt to be incurred by the issuance of the bonds.”

Section 3455, of the Revised Codes of Montana of 1907, which prescribes the form and method of giving notice of an election upon the question of issuing bonds, provides in part as follows:

“The notice must state the time and place of holding the election, the amount and character of the bonds proposed to be issued, and the particular purpose therefor.”

It is difficult to perceive how the court could have more explicitly expressed its interpretation of the constitution and statutes on this subject, or more completely decided the question as to the sufficiency of the notice of election which is here raised.

When the legislature has prescribed the mode by which a given power is to be exercised by a municipality, this mode must be pursued.

Shapard v. City of Missoula, 49 Mont. 269, 141.  
Pac. 547;  
Missoula St. Ry. Co. v. City of Missoula, 47 Mont.  
95, 130 Pac. 773.

III.

From what has been said above, it is respectfully submitted that the notices of election, a copy of which is set out above, fully complies with the requirements of Sections 3454, et. seq., of the Revised Codes of Montana.

IV.

Specifications of Error Nos. II, III, and IV do not require separate treatment, but involve the same propositions as those presented above, and the argument need not be repeated. If the court erred in holding that it is necessary to submit the question of exceeding or extending the debt limit, it would follow that the court was in error in holding the bond issues illegal, and in finding in favor of appellees, and in making and entering its decree in their favor.

It is submitted that the form of submission of the question of issuing the bonds involved herein in the notices of election conformed to the Constitution and statutes of Montana; that the bonds as issued were legal and valid; that the appellees should have accepted them under their contract; and that the decision and decree of the lower court should be reversed with instructions to enter a decree in favor of the appellants.

Respectfully submitted,

H. D. KREMER,

GEORGE Y. PATTEN,

Solicitors for Defendants and Appellants.



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IN THE

United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

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CITY OF BOZEMAN, a Corporation,  
JOHN A. LUCE, Mayor of the City of  
Bozeman, and C. A. SPIETH, City  
Clerk of the City of Bozeman, }  
Appellants,  
vs.  
SWEET, CAUSEY, FOSTER & COM-  
PANY, a Corporation, JAMES N.  
WRIGHT & COMPANY, a Corpora-  
tion, and C. W. McNAIR & COM-  
PANY, a Corporation, }  
Appellees.

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BRIEF OF APPELLEES

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Filed

MAY 14 1917

E. C. DAY,

F. D. Monckton,

THOS. A. MAPES,

Clerk

Attorneys for Appellees.

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BRIEF OF APPELLEES

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The facts are correctly stated in the brief of Appellants. It may be necessary in the course of the argument to refer to additional facts, but such reference will be made when attention is called to them.

The lower court held that the notice of election should have submitted the proposition as to whether

the three per cent debt limit should be extended or exceeded for the purpose of issuing the bonds. In this we submit that there was no error. While the particular question here presented has not been directly involved in the cases before the Supreme Court of Montana, the language of the Constitutional and Statutory provisions is so plain and unequivocal and the purpose of these provisions to protect the taxpayer so apparent, that there is not much room for argument.

Section 6, Art. XIII of the Constitution quoted in Appellants' brief fixes the limit of indebtedness to be contracted by a city *in any manner* at three per cent.

"Provided, however, that the legislative assembly may extend the limit mentioned in this section, by authorizing municipal corporations to submit the *question* to a vote of the taxpayers affected thereby," when such increase is necessary to construct a sewerage system or procure a water supply. It is plain from this Constitutional provision that the question to be submitted is the extension of the limit of indebtedness, not the manner of creating the debt. No other authority is conferred upon the legislative assembly to extend the limit than is to be found within this section, and unless it is found here it does not exist.

But it will be noted that the Legislative Assembly, when enacting laws to carry this provision into effect, also took into consideration the method or manner of creating the debt. Section 3259, Sub-div. 64

of Rev. Codes 1907, involves several subjects of legislation, as will be apparent if we print the section in paragraphs. It provides as follows: City Councils shall have power

“64. To contract an indebtedness on behalf of a city or town, upon the credit thereof, by borrowing money or issuing bonds for the following purposes, to-wit: erection of public buildings, construction of sewers, bridges, water-works, lighting plants, supplying the city or town with water by contract, the purchase of fire apparatus, the construction or purchase of canals or ditches and water rights for supplying the city or town with water, and the funding of outstanding warrants and maturing bonds;

provided, that the total amount of indebtedness authorized to be contracted in any form, including the then existing indebtedness must not, at any time, exceed three per centum of the total assessed valuation of the taxable property of the city or town, as ascertained by the last assessment for State and County taxes.

**PROVIDED**, that no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system, water supply, or sewerage system, until the proposition has been submitted to the vote of the taxpayers affected thereby of the city or town and the majority vote cast in favor thereof, and,

**FURTHER PROVIDED**, that an additional indebtedness shall be incurred, when necessary,

to construct a sewerage system or procure a water supply for the said city or town which shall own or control said water supply and devote the revenue derived therefrom to the payment of the debt: The additional indebtedness authorized, including all indebtedness heretofore contracted, which is unpaid or outstanding, for the construction of a sewerage system, shall not exceed ten per centum over and above the three per cent, heretofore referred to, of the total assessed valuation of the taxable property of the city or town as ascertained by the last assessment for State and county taxes;

and, PROVIDED FURTHER, that the above limit of three per centum shall not be extended, unless the question shall have been submitted to a vote of the taxpayers affected thereby and carried in the affirmative by a vote of the majority of said tax-payers who vote at such election.”

The first paragraph confers upon City Councils the power to contract an indebtedness by borrowing money or issuing bonds for eight distinct purposes. The second paragraph carries into effect the constitutional provision of Section 6 that the total amount of the indebtedness contracted *in any form* must not exceed three per cent of the taxable property. The third paragraph provides that *no bonds* must be issued for securing a water plant or constructing a sewer until the *proposition* has been submitted to a vote of the taxpayers. The fourth paragraph authorizes an *additional* indebtedness, when necessary

to secure a water plant or sewerage system, with two qualifications, viz: the city must own the water system and devote its revenues to the payment of the debt, and the *additional* indebtedness including all indebtedness theretofore contracted must not exceed ten per cent of the valuation of the taxable property, over and above the three per cent above referred to. And lastly it is positively provided "that the above limit of three per centum shall not be extended, unless the *question* shall have been submitted" to the taxpayers. As the court below says in his opinion:

"The question that the Statute directs shall be submitted is not, shall the city incur a bonded debt, but is, shall the city incur a bonded debt extending or exceeding the three per cent limit. To vote for the first is not to vote for the last." (Rec. p. 75).

The principle here expressed was involved in the case of Carlson vs. City of Helena, 39 Mont. 104, 102 Pac. 39, a case cited by Appellants counsel, and the opinion presents the most exhaustive discussion of these constitutional and statutory provisions. That case, however, is chiefly valuable because it presents a correct method of submitting the question.

In the Ordinance calling the special election referred to in the Carlson case the purposes of the special election are described as follows:

"Section 1. That a Special Election be held in the city of Helena on the 25th day of April, 1908,

*for the purpose of ascertaining the will of the tax payers, to be affected thereby, and that authority may be given and power conferred upon the City Council to increase the indebtedness of said City over and above the three per cent limit fixed by law, by the issuance,"* of the bonds described therein. It will be noted that the purpose of the election is defined to be specifically the determination of the will of the tax payers upon the question that authority be given to the City Council to increase the indebtedness of the City over and above the three per cent limit. In the case at bar in the notice of election no intimation is given with reference to either the Sewer or Water Works Bonds that the indebtedness of the City was to be increased above the three per cent limit.

In the Carlson case the Court was not called upon to determine whether or not the question of exceeding the three per cent limit should be submitted, because that proposition was submitted in specific terms. The contention in that case turned upon the question as to whether authority to incur an indebtedness included an authority to issue bonds. The Court held that it did. It does not follow, however, from this decision that a reverse statement of this proposition would be true, namely that authority to issue bonds involve authority to incur an indebtedness in excess of the three per cent limit. The Legislature has declared that "no money must be borrowed on bonds issued for the construction, purchase or securing of a water plant, water system,

water supply or sewerage system, until the *proposition* has been submitted to the vote of the taxpay-  
ers affected thereby.” (Rev. Codes 3259). In the  
same section, it also provides that the limit of three  
per cent shall not be extended until that *question*  
shall have been submitted. When the question sub-  
mitted is, as was the case at bar, merely the issu-  
ance of bonds, the presumption is that the bonds  
are within the three per cent limit. Issuance of  
bonds is a matter of creating a debt and whether  
bonds or warrants shall be issued is not prescribed  
by the Constitution. Issuance of bonds in excess of  
the three per cent limit is the exercise of a special  
power which the Constitution says can be exercised  
only when specific authority is conferred.

The case of Arnold vs. Miles City, 46 Mont. 481,  
128 Pac. 915, cited in Appellants’ brief, did not pre-  
sent the questions here involved at all. There the  
bond issue before the Court was one for the con-  
struction of a bridge, a purpose which did not need  
a submission to the voters for authority to issue  
bonds. The question involved is very clearly stated  
by the Court to be whether a City, after having  
necessarily and legally incurred an outstanding in-  
debt edness for a water supply or sewer system, un-  
der the ten per cent limit, can thereafter incur an  
additional indebtedness under the three per cent  
limit for building a bridge, the existing indebted-  
ness of the city, incurred under the three per cent  
limit having fallen below that limit by reason of  
payments made thereon. The indebtedness is re-

quired by the Statute to come within the three per cent limit. Whether bonds or warrants were issued for that purpose was entirely within the discretion of the City Council, if there was any room for the amount within the three per cent limit. How the question of extending the limit for the water supply or sewerage system was submitted does not appear from the report of the case. But the statement of facts prepared by Judge Smith says "It was necessary at the time the indebtedness was incurred to resort to the 10 per cent limit in order that the city might acquire a water plant and sewerage system, and the bonded indebtedness of \$225,000 was duly and regularly incurred for those purposes." So that, the language quoted by counsel from the opinion of Judge Smith, at page 10 of his Brief, was clearly obiter as regards the method of submission.

The case of Kerlin vs. City of Devils Lake, 141 N. W. 756, cited by Appellants might well be disposed of by reference to the case of Carlson vs. City of Helena, *supra*. But we take the liberty of calling the court's attention to the fact that the official ballot in the Kerlin case, like that in the Carlson case, specifically stated that the purpose was to increase the indebtedness and to issue bonds of the city in an amount equal to three per cent "over and above the five per cent limit of indebtedness." The language of the opinion cited by Counsel in his brief on page 15 was, to say the least, inapt.

The case of City of Oxnard vs. Bellat, 130 Pac. 701, is also of no weight as authority upon the ques-

tion here involved, for the reason that the extension of the debt limit was not present, but only the question as to whether a vote to issue bonds was a vote to create an indebtedness for the amount of the bonds.

Reference is made in the brief to Section 3454 of Rev. Codes 1907. An examination of that section discloses that it is merely declaratory of powers already conferred. If it has any bearing upon the question at issue here, it illustrates the fact that the legislature always had in mind a distinction between issuing bonds or contracting an indebtedness.

So that, we respectfully submit that the court below did not err in its interpretation of the Statutory and Constitutional provisions of Montana.

BONDS WERE VOID BECAUSE CREATING  
AN EXCESSIVE INDEBTEDNESS, EVEN  
THOUGH AUTHORIZED AFTER  
PROPER SUBMISSION OF  
QUESTION.

Assuming, however, that the court erred in holding that the question of the extension of the debt limit was not properly submitted, the action of the Court in ordering the certified checks delivered up for cancellation, was justified because the facts showed, that while the issue of Sewer Bonds would be within the ten per cent limit, the issue of \$135,000 of new Water Works bonds would be beyond the ten per cent limit. The two issues were offered as one at the sale. The bids were made and accepted for

both issues. The contract provides for the return of the checks if either issue is declared invalid, and therefore must be treated as an entirety and the sale declared to be void, if the two issues are not both valid.

The illegality of the proceedings were assailed in the Bill of Complaint upon the following grounds: (Tr. p. 18)

“(a) That at the time of the submission of the question of the issuance of said bonds to the taxpayers affected thereby, said City of Bozeman was indebted in excess of three per cent of the taxable value of the property of said City as the same appeared upon the assessment roll of said city for the year 1915, which fact will more fully appear by reference to the financial statement of said city attached hereto and heretofore referred to as ‘Exhibit E’; that the question of extending the limit of indebtedness of said city for the purpose of procuring a water-supply or the construction of sewers in excess of the three per cent limit of the taxable property and within the limit of ten per cent of the taxable property, as provided by the Constitution of the State of Montana, was never submitted to the taxpayers affected thereby.

“(b) That the issuance of the \$235,000.00 of Water Works Bonds and \$70,000.00 of Sewer Bonds would in fact increase the indebtedness of said city beyond the thirteen per cent limit of indebtedness as fixed by the Constitution of the State of Montana, assuming that the question of extending the limit of indebtedness be-

yond the three per cent limit had been properly submitted to the taxpayers.

“(c) That the question of the issuance of the \$235,000.00 of Water Works Bonds, of which \$100,000.00 were to be used for funding bonds and \$135,000.00 for the construction of additions to the water supply, was a double question, and was submitted to the taxpayers of said city as one question, and that the taxpayers affected thereby were never permitted the opportunity of expressing their will upon the two separate questions.”

The plaintiff offered in evidence the financial statement, “Exhibit E”, attached to the Bill of Complaint (Tr. p. 44) the delivery of which to the plaintiffs as preliminary to their bid on the bonds was admitted in the answer, and the correctness of the recitals therein contained was testified to by the City Clerk. From this statement it appears that the taxable property of the City of Bozeman, as shown by the assessment roll for the year 1915, being the last assessment roll prior to the sale of the bonds, was \$3,209,196.00. Three per cent of this amount would be \$96,275.88; ten per cent of this amount would be \$320,919.60. The statement also showed the outstanding indebtedness of the City at the close of business March 31st, 1916, as follows, to-wit:

Water Bonds.....	\$100,000.00
City Hall Bonds.....	21,000.00
Re-funding Bonds.....	166,000.00
Floating Indebtedness.....	975.00
<hr/>	
TOTAL INDEBTEDNESS....	\$287,975.00

The City also had on hand cash applicable to the redemption of the bonds amounting to \$6,172.38, which amount ought perhaps to be deducted from the amount of the total indebtedness, but in view of the other circumstances surrounding the case, it is immaterial whether this amount be deducted or not. If the issue of Re-funding Bonds, aggregating \$166,000.00, are a valid outstanding indebtedness of the City, then the City, at the time of the attempt to issue the bonds in controversy, had exceeded the limit of three per cent referred to in the Constitution and statutes of the State of Montana, because it appeared upon the trial that this was an issue of bonds made in 1914 for the purpose of funding outstanding general warrants of the City, no part of which had been expended for water or sewer purposes.

The City contended that this issue of re-funding bonds took up outstanding warrants all of which had been issued at a time when the City had exceeded its limit of indebtedness for general purposes, and that therefore the total amount of this issue must be excluded from the computation of the limit of indebtedness to be applied in determining the validity of the bonds in controversy in this action, leaving

only the general indebtedness of the City, amounting to \$21,000.00. The plaintiffs contend that the City is estopped from asserting the invalidity of the issue of re-funding bonds. Evidence was introduced on the trial to sustain the fact that the warrants for which the funding bonds were issued were all issued at a time when the City had exceeded its constitutional limit, and therefore the bonds would be invalid if the City were not estopped from raising that question.

In the financial statement submitted to the plaintiffs as preliminary to their bid, these recitals appear: "No previous issues of bonds have been contested \* \* \* there is no controversy or litigation pending or threatened affecting \* \* \* the validity of these bonds." The City Clerk testified (Tr. p. 122) that he made the statement containing these recitals, and that he believed them to be true when made, and that there was no record in the office of the City Clerk which would show the contrary of them. He also testified that he had in his possession as City Clerk the record of the proceedings of the City Council resulting in the issue of the series of re-funding bonds. He also had in his possession the original ordinance fixing the form of those bonds, and that ordinance contained the following clause:

"It is hereby certified and recited that this bond is issued in strict compliance with and in conformity to the laws and constitution of the State of Montana, and that all acts, conditions

and things required to be done precedent to the issuance of this bond have been properly and legally done, had and performed, and the full faith and credit of said City are hereby irrevocably pledged to the payment of this bond, according to its terms.”

The question then arises, was the City estopped by these recitals from asserting the invalidity of the issue of re-funding bonds. This subject has received the attention of the Courts in many cases, but we are not left without authoritative decisions for the reason that the Supreme Court of the United States has fully covered the subject in several cases, which are leading cases upon the questions involved. In the case of Buchanan vs. Litchfield—102 U. S. 278—in an action by a holder of bonds to recover the amount of unpaid interest coupons attached to certain bonds issued by a municipal corporation in the State of Illinois, the rights of the holder of such bonds were presented to the Court. Mr. Justice Harlan, delivering the opinion, said:

“In determining whether the constitutional limit of indebtedness has been exceeded by a municipal corporation, an inquiry would always be necessary as to the *amount of taxable property* within its boundaries. Such inquiry would be solved, not by information derived from individual officers of the municipality, but only in the mode prescribed in the Constitution; that is, by reference to the last assessment for state and county taxes for the year preceding the issue of the bonds.” \* \* \* “But in what way

was the purchaser to ascertain the extent of the City's indebtedness existing at the time the bonds in question were issued? The extent of that indebtedness was a fact peculiarly within the knowledge of the constituted authorities of the City. It was necessarily left, both by the Constitution and the Statute of 1873, to their examination and determination, under the constitutional injunction, however, that no municipal corporation should exceed the prescribed amount of indebtedness. It was, nevertheless, a fact which, so far as we are advised by the record, could not, at all times and absolutely or with reasonable certainty, be ascertained from any official documents to which the public had access. A like difficulty, perhaps, would arise in the case of any municipal corporation, possessing the general power of raising money, by taxation and otherwise, to carry on local government. Its liabilities might frequently vary in their aggregate amount, and at particular periods might be of different kinds, some fixed and absolute, while others would be contingent upon events thereafter to happen. These considerations were, doubtless, present in the minds as well of those who framed the Constitution as of those who passed the Statute of 1873.

“As, therefore, neither the Constitution nor the Statute prescribed any rule or test by which persons contracting with municipal corporations should ascertain the extent of their ‘existing indebtedness’, it would seem that if the bonds in question had contained recitals which, upon any fair construction, amounted to a representation upon the part of the constituted authorities of

the City that the requirements of the Constitution were met, that is: that the City's indebtedness, increased by the amount of the bonds in question, was within the Constitutional limit, then the City, under the decisions of this Court, might have been estopped from disputing the truth of such representations as against a bona fide holder of its bonds."

In the Litchfield case it was held that inasmuch as the bonds in controversy contained no recitals of compliance with the constitutional requirements, the City was not estopped from raising that objection. But in the case of Gunnison vs. E. H. Rollins, 173 U. S. 689—the question was presented to the Supreme Court in an action on an issue of bonds which recited full compliance with the constitutional requirements. The Supreme Court, again speaking by Mr. Justice Harlan, reviews very fully not only the case of Buchanan vs. Litchfield, but several later cases in that Court, including the case of Chaffee County vs. Potter—142 U. S. 355—In both the Gunnison and Chaffee cases the constitutional provision of the State of Colorado was involved, and doubtless the Court is aware that it has been asserted that our constitutional provisions have been taken from Colorado. After reviewing severally the authorities, Mr. Justice Harlan thus concludes:

"It was expressly decided in the Chaffee case that the statute under which the bonds there in suit (the bonds here in suit being of the same class) authorized the county commissioners to determine whether the proposed issue of bonds

would in fact exceed the limit prescribed by the Constitution and the statute; and the recital in the bond to the effect that such determination had been made and that the constitutional limitation had not been exceeded, taken in connection with the fact that the bonds themselves did not show such recital to be untrue, estopped the county, under the law, from saying that the recital was not true. We decline to overrule Chaffee County vs. Potter, and upon the authority of that case, and without re-examining or enlarging upon the grounds upon which the decision therein proceeded, we adjudge that as against the plaintiff the county of Gunnison is estopped to question the recital in the bonds in question, to the effect that they did not create a debt in excess of the constitutional limit, and were issued by virtue of and in conformity with the statute of 1881, and in full compliance with the requirements of law."

So that we think that it is the settled rule of the Supreme Court of the United States that where municipal bonds recite upon their face full compliance with the constitutional and statutory requirements of the state of their issuance, the municipality estopped from asserting the invalidity of such issue as against such bonds in the hands of a bona fide holder. We are unable to find any case which deals with the right of an intending bidder to rely upon the recitals of the records in declining to complete his bid. But if the purchaser of the series of refunding bonds had the right to rely upon the recitals of the records of the City of Bozeman with reference

to these bonds, and if those bonds are by reason of said recitals valid outstanding obligations of the City in the hands of third persons who are not parties to this litigation, it is difficult to conceive upon what ground this Court would impose a greater duty with reference to such recitals upon an intending purchaser of a later series of bonds than it could impose upon the purchaser in an action in this Court upon the re-funding bonds themselves. On the contrary, it seems to us that the Court will hold that the intending bidder was entitled to rely upon the recitals of those records as to the validity of the re-funding bonds in attempting to determine the amount of the outstanding indebtedness of the City. A person in law is only bound to know the facts which might be ascertained upon inquiry into the transaction indicated. We therefore submit that for the purpose of this suit, the issue of re-funding bonds was an "indebtedness heretofore contracted which is unpaid or outstanding" within the provisions of sub-section 64, section 3259, Revised Codes of Montana, 1907, and that the City had no authority to issue any of the bonds in controversy without first submitting to the vote of the taxpayers the question of extending the limit of indebtedness beyond three per cent, and had no authority to issue such bonds, even after a vote of the people, where the aggregate of the indebtedness, outstanding and authorized, exceeded the ten per centum over and above the three per centum limit. That this issue did so exceed the limit is shown by a statement of the condition of the

indebtedness with the bonds in controversy issued.

Existing Indebtedness, including

\$100,000.00 Water Works

Bonds ..... \$287,975.00

Sewer Bonds ..... 70,000.00

---

TOTAL ..... \$357,975.00

New Water Works Bonds ..... 135,000.00

---

TOTAL ..... \$492,975.00

3% Taxable prop-

erty ..... \$ 96,275.88

10% Taxable prop-

erty ..... 320,919.60 417,195.48

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Excess of Water Bonds ..... \$ 75,779.52

#### SUBMISSION OF A DOUBLE QUESTION.

The notice of the election for the issuance of the Water Works Bonds, however, submitted as one question the issuance of Refunding Bonds and New Bonds. This presented to the tax payers a double question which could not be submitted in one and the same ballot.

Stern vs. Fargo, 26 L. R. A. (N. S.) 665;

Blaine vs. Hamilton, 116 Pac. 1076, 35 L. R. A. (N. S.) 577;

Tullock vs. City of Seattle, 124 Pac. 481;

Lobough vs. Cook, 127 Iowa 181;

McBryde vs. City of Montesana, 34 Pac. 559.

In the last case cited the identical question here involved, viz: the submission of a proposition to fund old debts and borrow money for future purposes was presented and held to be the submission of two propositions in one ballot, which was improper. Upon the general question of the divisability of questions and the necessity of giving to the voter an opportunity to express an opinion upon each, reference is made to the case of the State ex rel Hay vs. Alderson, 41 Mont. 385.

We therefore respectfully submit that the action of the Court below should be affirmed.

E. C. DAY,

THOS. A. MAPES,

Attorneys for Appellees.

IN THE  
United States Circuit Court of Appeals  
FOR THE  
NINTH CIRCUIT.

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CITY OF BOZEMAN, a Corporation,  
JOHN A. LUCE, Mayor of the City  
of Bozeman, and C. A. SPIETH,  
City Clerk of the City of Bozeman,  
Appellants,

vs.

SWEET, CAUSEY, FOSTER & COM-  
PANY, a corporation, JAMES N.  
WRIGHT & COMPANY, a Corpora-  
tion, and C. W. McNEAR & COM-  
PANY, a Corporation,  
Appellees.

REPLY BRIEF OF APPELLANTS. *D. Monckton*,  
Clerk.

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H. D. KREMER,  
GEORGE Y. PATTEN,  
Solicitors for Appellants.

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REPLY BRIEF OF APPELLANTS. .

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I.

To facilitate the examination of Sub-division 64, of Section 3259, Revised Codes of Montana of 1907, counsel for appellees have set out the different clauses in five paragraphs on pages 3 and 4 of their brief. This vivid presentation of the sub-section we

think serves to make more apparent the contention of appellants in respect to its interpretation, as this arrangement emphasizes the fact that the subject of the sub-section, as disclosed in each paragraph, is *indebtedness*—as it is also the subject of the constitutional provision involved.

As suggested in the brief of appellees, the first paragraph confers upon city councils the power to contract an indebtedness for eight distinct purposes. The second paragraph merely declares the constitutional limit of three per centum for general purposes. The third paragraph adds to the first paragraph by prescribing that indebtedness for two of the eight purposes stated in the first paragraph—water and sewers—may only be incurred after the proposition of creating the indebtedness has been submitted to the taxpayers. In the fourth paragraph the legislature avails itself of the permission conferred by the constitution, and extends the debt limit ten per centum over the three per centum for water and sewer purposes. The fifth paragraph then provides that the above limit of three per centum shall not be extended unless the question shall have been submitted to a vote of the taxpayers. When we consider that the purpose of the sub-section is indebtedness—the creation of indebtedness—we submit that the reasonable interpretation is that the *question* referred to in the fifth paragraph is the question of the creation of the indebtedness.

Again, the constitutional provision is the one enactment to which the statutory provisions involved

in this inquiry must conform, and so far as the statutory provisions are concerned, they stand upon a parity. As previously shown, Section 3455, of the Revised Codes of Montana, as construed in the *Carlson case*, prescribes what the notice of election must contain, and how the vote must be taken. It is not suggested in the brief of appellees, nor in the opinion of the lower court, that there is any conflict between Sub-division 64 of Section 3259 and Section 3455, and we submit that there is none. Neither is it urged that the former section is controlling as against the latter. Under a familiar rule of statutory interpretation, various acts of the legislature pertaining to the same subject are to be construed together, and effect given to the various provisions if possible. Applying this rule, it may be said that if any doubt exists as to what the *question* is that is referred to in the last paragraph of Sub-division 64 of Section 3259, such doubt is removed, and certainty is attained, when we consider that sub-section in connection with Section 3455. The argument of counsel for appellees ignores the provisions of the latter section.

Counsel for appellees say, as did lower court, that the Supreme Court of Montana has not passed on this question. In using the language quoted ~~above~~ from the *Carlson case*, that the question required to be submitted is whether the bonds shall be issued, the court has decided all that is here involved, whether the inquiry there was precisely the same as here, or not. As contended by us in the former brief, the

*principle* established by the Carlson decision is determinative of the question here. Furthermore, even if it can be said that the language used by the Supreme Court of Montana in the *Arnold case*, quoted from in our former brief, which is explicit on this point, is obiter, it clearly indicates the opinion of the court as to the effect of its former decisions, and particularly that in the *Carlson case*. Certainly, from these various decisions, it must be said that the supreme Court of Montana has indicated that it holds the view of this question which is contended for by appellants.

## II.

Counsel for appellees again present in this court the other grounds, set out in their bill of complaint, upon which they have asserted the issue of bonds in question to be illegal, but which were not ruled upon in the lower court, except in the comment in the opinion that they were in part, at least, untenable. The first of these contentions is that the bonds are void because creating an excessive indebtedness.

The only facts necessary to a determination of this question are undisputed, viz: (1) that at the time of the issuance of the bonds in question the general indebtedness of the City of Bozeman was in excess of the authorized three per cent for general purposes; and (2) that the bonds in question constituted the only outstanding bonds or indebtedness of the city for water and sewer purposes, and were within ten per cent of the value of the taxable property of said city.

The contention of appellees is that the whole of the *general* indebtedness of the City of Bozeman—that which is within the three per cent limit, as well as that which is beyond the three per cent limit—is to be added to the amount of these water and sewer bonds, and inasmuch as the total will exceed thirteen per cent of the value of the taxable property in the city, these water and sewer bonds are invalid.

The appellants' contention, on the other hand, is that the ten per cent extension is to be computed independently of the general indebtedness; that the borrowing power conferred upon cities under this extended limit has been created by the legislature, under the Constitution, for special purposes, which cannot be lost or abridged by any improvidence of the city in its general indebtedness; and that, regardless of a city's general indebtedness, this ten per cent extension is yet available for the purposes for which it was set apart.

The appellees' brief, at the top of page 12, correctly shows the indebtedness of the city at the time of the issuance of these bonds. The \$100,000 of water bonds were included in the new issue, so that the latter created no new indebtedness. The remainder of the city's indebtedness was made up of the City Hall Bonds aggregating \$21,000, Funding Bonds aggregating \$166,000, and the floating indebtedness of \$975.

The issue of funding bonds to the amount of \$166,000. was for the purpose of funding warrants against the various funds of the city outstanding at

the time, which had been issued for general purposes, and none of which had been issued for water or sewer purposes. An examination of the figures shown in the testimony of the witnesses D. S. McLeod and John L. Ketterer (Rec. pp. 112-117), will show that each warrant thus funded was issued at a time when the city had exceeded its three per cent limit, and that therefore each warrant when issued was invalid, which invalidity unquestionably extended to the bonds which funded the warrants. While this showing was made for the purpose of laying all of the facts before the court, they are, in our view of the case entirely immaterial, and it was unnecessary to have shown them at all. As stated above, our contention is that inasmuch as it appears without dispute that the city had no outstanding bonds or indebtedness for water or sewer purposes except the bonds here involved, the only question to be determined is, *Do these issues come within ten per cent of the assessed valuation of property in the City of Bozeman for the year 1915?* If they do, they are valid, notwithstanding the city was at the time indebted for general purposes beyond the three per cent limit.

While under the decisions of the Montana Supreme Court, water and sewer bonds may fall within the three per cent limit, *under the very terms of the constitution itself, general indebtedness can never, under any circumstances, invade the ten per cent extension, which is for water and sewer purposes only.*

In this view of the case, the decision in the case of

*Buchanan v. Litchfield*, 102 U. S. 278, and the subsequent decisions of the United States Supreme Court which followed it, and which are referred to on page 14 of the brief of appellees, are not pertinent here. These cases are authority for the proposition that the City of Bozeman would be estopped to question the validity of the bonds of the \$166,000 funding issue in the hands of innocent purchasers, because of the recital in the bonds that they were issued in full compliance with the constitutional and statutory requirements. These cases merely apply the principle of estoppel, and rest upon the consideration that municipal bonds are negotiable securities which pass from hand to hand; that those who purchase them in the bond markets are not in a position to examine the records and proceedings of the municipality which issued them, and are not required to do so; that such purchasers are warranted in relying upon the statement in the bonds that they are issued in strict conformity with the constitutional and statutory provisions; and that, when such purchasers have parted with value, the municipality is estopped to deny the validity of the bonds. These cases hold that such bonds are valid in the hands of innocent purchasers from the original purchaser. They do not go to the extent of holding that such bonds are valid at the time of sale, as between the municipality and the original purchaser. If so, the argument would be an unhappy one for counsel for appellees, because it would at once dispose of all of their alleged grounds of illegality adversely to them.

The purpose of their argument, however, is to establish that the \$166,000. of funding bonds, which carry the general indebtedness beyond the three per cent limit, constitutes an enforceable indebtedness against the City of Bozeman. The law of these cases is not applicable here, because we concede that the City of Bozeman had, at the time of the issuance of these bonds, a general indebtedness in excess of three per cent, and contend that the ten per cent extension for water and sewer purposes was not affected thereby.

The Supreme Court of Montana in various cases has considered almost every phase of the constitutional and statutory provisions here involved, and has quite clearly made the distinction that while water and sewer bonds may fall within the three per cent limit to the extent that any margin thereof may remain at the time of their issuance, yet general indebtedness can never encroach upon the ten per cent extension, which is reserved for bonds or indebtedness for water and sewer purposes only. That is, the three per cent limit, which comprehends indebtedness of every kind, may include water and sewer indebtedness, whereas the ten per cent extension, which is limited to specific purposes, cannot be invaded for other purposes—the general purpose can include specific purposes, but the specific purpose can not be stretched to include general purposes.

Lepley v. City of Fort Benton, 51 Mont. 551,  
154 Pac. 710;

Arnold v. City of Miles City, 46 Mont. 478,  
128 Pac. 915;

Butler v. Andrus, 35 Mont. 575.

The precise principle here contended for is stated in the case last cited, page 581, as follows:

“The proviso under which the legislature may authorize an extension of the limit is also clear in purpose, to-wit, to allow an extension of this limit when such extension (increase) is necessary to construct a sewerage system or procure a water supply. *It cannot be granted or be made available for any other purpose or under any other circumstances than those which create the necessity for it.*”

This question has also been passed upon by the Supreme Courts of the states of South Dakota and Utah, in construing constitutional provisions entirely analogous to our own, in the cases of

Wells v. City of Sioux Falls, 16 S. D. 547, 94  
N. W. 425;

People v. City Council, (Utah) 64 Pac. 460.

Both of these cases squarely hold that the extended limit for special purposes is entirely separate and distinct from the limit for general indebtedness, and that a city may incur legal indebtedness to the full amount of the extension for the special purposes prescribed, notwithstanding the limit for general purposes has been exceeded.

In the former case it is said:

“The existence of a large municipal debt does not render an adequate water supply less necessary or beneficial. Indeed, the ability to provide pure water for domestic uses may become absolutely essential to the procurement and retention of a population sufficient to meet existing municipal obligations. The Constitution of Utah contains provisions strikingly analogous to those under discussion. Says the Supreme Court of that state: ‘The limited restriction and the restricted grant to create indebtedness are essentially independent and distinct, and the general and special debts which they authorize are separated by their purposes and the separate powers under which they must be incurred. This would clearly be the natural operation and effect of the two 4 per cent. limits in the absence of any contingency, such as a decrease in the valuation of the taxable property, which would cause the 4 per cent. of the valuation under the general power to be less than the indebtedness. But the happening of such a contingency cannot change the purpose and natural operation of the section, nor affect the special power under which the municipality in this case seeks to act.’ People v. City Council (Utah) 64 Pac. 460. Concurring in the view thus clearly expressed, we cannot escape the conclusion that the validity of the bonds involved in this action is not affected by the defendant city’s existing indebtedness for general purposes.”

In the case of *Ashelot National Bank v. Lyon County*, 81 Fed. 127, it was held that the bonds of

a municipal corporation which are void because in excess of the constitutional limit of indebtedness are not to be counted in estimating the indebtedness of the corporation with reference to the validity of another issue of bonds.

### III.

Counsel next briefly present the third alleged ground of invalidity of the bonds—that there was a dual submission in the grouping together as one question the proposition of the issuance of the water funding bonds, and of the new water bonds for extensions of the system. This question, however, has also been disposed of by the decisions of the Montana Supreme Court.

In the *Carlson case*, previously referred to, the court said:

“Counsel insist that Ordinance No. 717 is void in that it contains two subjects, and is obnoxious to the prohibition contained in section 3265 of the Revised Codes, which declares ‘\* \* \* No ordinance shall be passed containing more than one subject, which shall be clearly expressed in its title, except ordinances for the codification and revision of ordinances.’ This provision imposes the same restriction upon the city council as is imposed by the Constitution upon the legislature (Constitution, Art. IV, Sec. 23), and the purpose is the same. This purpose is pointed out in *State v. McKinney*, 29 Mont. 373, 74 Pac. 1095, and the cases on the subject are there collated. The observance of the limi-

tation is mandatory, and renders void any ordinance which violates it. But whatever is germane, incidental or necessary in the main or general subject of an ordinance may be included in it and is not a separate subject. (*State v. McKinney, supra.*) The general subject of ordinance 717 is the incurring of the indebtedness by the city. The different purposes named as making this necessary are matters of detail for the information of the tax payers. The ordinance is not objectionable for the reason urged.”

28 Cyc. 1590;

McQuillan on Municipal Corporations, Vol. 5, Sec. 2198.

In the case of *Stern v. Fargo*, 26 L. R. A. (N. S.) 665, principally relied upon by counsel for appellees, is a leading case on the subject, and collates the authorities. It illustrates the distinction made by the courts, which runs through all of the decisions on the subject, between cases where the propositions submitted are so related as to effect one purpose, and those in which they are so unrelated as to effect two or more purposes. The court there holds that *the test whether questions submitted include one purpose or more is whether the objects for which bonds are to be issued have a natural or necessary connection with each other; and if they have not, two purposes cannot be made one by verbal connection.*

In the case of *Blaine v. Hamilton*, 16 Pac. 1076,

35 L. R. A. (N. S.) 577 (*Wash.*), a case cited in appellees' brief, it is said that the true criterion is:

“Are the several parts of the projects so related that united they form, in fact, but one rounded whole?”

It is submitted that an analysis of the cases on the subject will disclose that the above constitute terse statements of the rule to be deduced from all of them. For the purpose of illustrating the distinction we subjoin brief statements of the holdings in what will be found to be typical cases.

In the case of *Stern v. Fargo*, *supra*, the resolution of the city council provided for the issuance of \$100,000 in bonds, for the purpose of defraying the cost of building and constructing a new water works pumping station, and for the purpose also of installing an electric light plant. The court held that while the two might be operated together, and that the same boilers might be used both for pumping and furnishing light, thus bringing about economy in operation, yet there were two distinct purposes which were not related one to the other.

In the case of *Oakland v. Thompson*, 151 Cal 572, 91 Pac. 387, the issuance of the bonds was for several separate parks, and it was held that there was but one purpose.

In the case of *Linn v. City of Omaha*, 76 Neb. 552, 107 N. W. 983, the bonds were to be issued to construct two fire engine houses, and it was held that there was but one purpose.

In the case of *People of Mariposa County v. Counts*, 89 Cal. 15, 26 Pac. 612, the object was to raise money for the construction of two separate wagon roads, and it was held that there was but one purpose.

In the case of *Louisville v. Park Commissioners*, 112 Ky. 409, 65 S. W. 860, the money was to be expended for city parks and sewers, and it was held that there was but one purpose.

In the case of *State ex rel City of Chillicothe v. Wilder*, 200 Mo. 97, 98 S. W. 465, the purpose was to construct a combined water works and electric plant, and the court held that there was but a single purpose.

In the case of *Cary v. Blodgett*, 10 Cal. App. 463, 102 Pac. 668, the purpose was to construct a combined water and light plant, and the court held that there was but a single purpose.

In the case of *Hughes v. Horsky*, (N. D.) 122 N. W. 799, the purpose was to erect a court house and jail, and the court held that there was but a single purpose.

In the case of *Manley v. Pueblo County*, 46 Colo. 491, 104 Pac. 1045, the purpose of the bonds was to refund two previous bond issues, and the court held that there was but a single purpose.

The case of *Blaine v. Hamilton*, quoted from above, sustains four different propositions to make one harbor as being one purpose, distinguishing that case from the case of *Blaine v. City of Seattle*, 114 Pac. 164, where there was submitted to the people

for a single affirmative or negative vote the proposition of bonding the city for specific sums for sites for firehouses, site for city stables, for the construction of fire houses, for a combined firehouse and dock, for a police station, for an isolation hospital, for a bridge on Spokane Avenue and for a bridge on Westlake Avenue. The latter was held to be in violation of the constitution and general laws in that they combined several non-related propositions.

In the case of *Tulloch v. City of Seattle*, 124 Pac. 483, (Wash.), the proposition was to issue bonds for the purchase of existing street railway lines, or in case such purchase was not deemed wise, the construction of a parallel line, and it was held that these were not several and distinct purposes so as to render a joint submission thereof invalid. In that case the court said:

“It must be conceded that cases may be found, such as *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400, 2 Ann. Cas. 367, *Stern v. Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665, and *Elyria Gas. Co. v. Elyria*, 57 Ohio St. 374, 49 N. E. 335, from which might be deduced a rule supporting appellant’s contention; but those cases, as applied to purposes naturally related, are not in harmony with our holding in *Blaine v. Hamilton*, and for that reason cannot be regarded as authoritative here. Their reasoning is more in accord with a state of facts similar to these submitted in *Blaine v. Seattle*, where the propositions as submitted are unrelated and have no natural connection one with

the other, and for that reason they are there cited as supporting the holding.

“All of the cases dealing with this question of related or unrelated purposes or objects are more or less influenced by the special provisions of Constitutions, statutes and ordinances, but running through them all may be found two easily distinguished principles. Separate, distinct, and independent purposes or objects may not be joined in one proposition for submission to the voter. United, related and dependent objects, that together form one general scheme or plan, may be united and submitted as one. No better illustrations of the application of these two principles may be found than in *Blaine v. Seattle* falling within the first rule, and *Blaine v. Hamilton* falling within the second rule. The case at bar belongs to the second class, and, adopting the reasoning employed in cases of that character, we hold there is no legal objection to the method employed in submitting this question of municipal ownership of street railways to the people, as definitely outlined in the ordinance and proposition whereby it was called to their attention; and their judgment, whether wise or unwise, good or bad, must be upheld.”

In the case of *Hartigan v. Los Angeles*, 149 Pac. 590, (Cal.), the purpose was to acquire and construct “works for supplying said city (Los Angeles) and its inhabitants with electricity for the purposes of light, heat and power, including the construction or acquisition of electric generating works, receiving substations, transmission lines, and the acquisition

of lands, water rights, rights of way, machinery, apparatus, and other works and property necessary therefor; \* \* \* also including the construction or acquisition of distributing lines, conduits, and substations, and the acquisition of lands, rights of way, machinery, apparatus and other works and property necessary therefor." Part of the proceeds from the bond issue was intended to be used in the completion of partly constructed work and the remainder for new work. It was held that there was a single purpose in the submission.

In the case of *Chandler v. City of Seattle*, 80 Wash. 154, 141 Pac. 331, the question submitted was the issuance of bonds for the enlargement and extension of the municipal lighting plant by the acquisition of lands for a site for a steam power plant for furnishing electricity for lighting, heating, fuel and power purposes, and for furnishing steam for heating purposes. It was held not objectionable as combining several unrelated purposes, the purpose being to have one efficient lighting system ready at all times to serve the people.

In the case of *Clark v. City of Los Angeles*, 160 Cal. 317, 116 Pac. 966, the purpose was to construct docks, wharves and harbors, and the opening, improving, construction and maintaining of streets and highways to navigable waters, the construction and maintaining of canals and water ways, and the acquisition of all necessary lands for the improvements. This was not held objectionable as submitting distinct propositions in a single question, the

contemplated improvements being of the same character, and all relating to the improvement of one harbor.

The case of *Ostrander v. City of Salmon*, 20 Ida. 153, 117 Pac. 692, is an interesting case on this subject, and illustrates the distinction between what is a dual question and what is a single question. There the question submitted was the issuance of bonds to the amount of \$30,000 to purchase a water system of the Salmon City Water Company, also to issue bonds to the amount of not to exceed \$15,000 to enlarge and extend the water system, and bonds to the amount of \$5000 to be expended for a public building and building site. It was held by the court that the issuance of the \$30,000 of bonds to purchase the water system and the \$15,000 of bonds to enlarge the same constituted one related purpose, whereas the issuance of the bonds for \$5,000 added a second proposition, and made the election void.

In the case of *Hurd v. City of Fairbury*, 87 Neb. 745, 128 N. W. 638, the submission was "for the purpose of purchasing or erecting, constructing, locating, and maintaining a system of water works within said city." It was held that the submission was not either dual or alternative.

Counsel for appellees cite the case of *McBryde v. City of Montesuno*, 34 Pac. 559, as being directly in point and determinative of the question here involved. While a casual reading of the syllabus might give this impression, an examination of the decision will disclose that it is in harmony with the

other decisions on the subject. If, as here, the indebtedness to be funded had been for the same purpose as the new bonds, the cases would be analogous, but that was not the case. The indebtedness there funded had been created for various purposes—there were outstanding \$6,000 of warrants for constructing an elevated railway, \$6,224.75 of light warrants for an electric light plant, and \$7,775.25 of warrants for general purposes. The new issue was to be for the sum of \$5,000 for the purchase of fire apparatus to the amount of \$1,500, and for the purchase of a lot of land and the erection of a city hall and jail thereon to the amount of \$3,500. It will be observed that the new bonds were even for a dual purpose, which would have to be condemned in the light of the cases cited above. The later Washington cases, and especially that of *Tulloch v. City of Seattle*, quoted from above, show that the rule in that state is in harmony with the authorities elsewhere on this subject.

There is a further consideration which, incidentally, was the reason for the action of the city in joining the proposition of the funding of the old water bonds and of the issuance of the new water bonds in one submission. Sec. 6 of Art. XIII, of the Constitution of Montana, which contains the authority for the issuance of these bonds, imposes the condition not only that the city shall own and control its water supply, but that it *devote the revenues derived therefrom to the payment of the debt*. The city had outstanding the \$100,000 of old water bonds which were

funded. Its revenues were pledged to the payment of that issue. To make any legal issue of water bonds such revenues must be so pledged. Had the city left the old bonds outstanding, and made a new issue of water bonds for the purpose of extending the system, a very serious question would have arisen as to its power to effectively pledge these revenues to the paymenet of the new bonds while they were still pledged to the payment of the old issue. It would seem that this pledge is indivisible, and that there could not be any pro rating of it among various issues. It was to save this question that the old bonds were funded, and the two were included in the same submission.

We respectfully submit that the bonds in question were legally issued, and that for the reasons stated in this brief and those stated in the former brief the judgment of the lower court should be reversed.

Respectfully submitted,

H. D. KREMER,

GEORGE Y. PATTEN,

Solicitors for Appellants.

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.  
(IN TWO VOLUMES.)

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PORTERVILLE CITRUS ASSOCIATION, a Corporation,

Appellant,

vs.

FRED STEBLER,

Appellee.

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VOLUME I.  
(Pages 1 to 384, Inclusive.)

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Upon Appeal from the United States District Court  
for the Southern District of California,  
Northern Division.

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Filed

JUL 3 - 1917

F. D. Monckton,  
Clerk.



United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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Transcript of Record.  
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**Citation.**

UNITED STATES OF AMERICA,—ss.  
The President of the United States to Fred Stebler,  
**GREETING:**

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered and of record in the clerk's office of the United States District Court for the Southern District of California, Northern Division, in suit in Equity No. A-44 therein, and wherein you are the complainant and appellee and Porterville Citrus Association is defendant and appellant, to show cause, if any there be, why the decree of said Court made and entered therein enjoining defendant and appellant as in said decree set forth, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable OSCAR A. TRIPPET, United States District Judge for the Southern District of California, Southern Division, this 21st day of November, 1916.

TRIPPET,  
United States District Judge.

Due service of a copy of the above Citation is hereby acknowledged this 21st day of November, 1916.

FREDERICK S. LYON,

Solicitor for Complainant and Appellee. [5\*]

[Endorsed]: No. A-44. United States Circuit Court of Appeals for the Ninth Circuit. Porterville

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\*Page-number appearing at foot of page of original certified Transcript of Record.

Citrus Association, Appellant, vs. Fred Stebler, Appellee. Citation. Filed Nov. 21, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [6]

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**Names and Addresses of Attorneys.**

For Appellant:

NICHOLAS A. ACKER, Esq., Foxcroft Building, 68 Post Street, San Francisco, California.

For Appellee:

FREDERICK S. LYON, Esq., 504-507 Merchants Trust Building, Los Angeles, California. [7]

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*In the District Court of the United States of America, in and for the Southern District of California, Northern Division.*

No. A-44—IN EQUITY.

FRED STEBLER,

Complainant,

vs.

PORTEVILLE CITRUS ASSOCIATION,

Defendant. [8]

*United States District Court, Southern District of California, Northern Division.*

IN EQUITY.

FRED STEBLER,

Plaintiff,

vs.

PORTEVILLE CITRUS ASSOCIATION,

Defendant.

**Bill of Complaint for Infringement of Letters Patent.**

Now comes Fred Stebler, a citizen, resident and inhabitant of the city of Riverside, State of California, plaintiff, who files this his Bill of Complaint against Porterville Citrus Association, a corporation, a citizen, inhabitant and resident of the city of Porterville, California, and complaining shows and alleges:

**I.**

That the ground upon which this Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

**II.**

That defendant, Porterville Citrus Association, is a corporation organized and existing under and by virtue of the laws of the State of California and has its principal place of business at Porterville, California.

**III.**

That heretofore, to wit, prior to April 28, 1902, one Robert Strain, then of Fullerton, California, was the original, first and sole inventor of a new and useful invention, to wit, a fruit grader, and on that day made application in due form of [9] law to the Government of the United States for the grant, issuance and delivery to him of letters patent of the United States therefor; that thereafter and prior to June 9, 1903, by an instrument in writing in due form of law duly signed by said Robert Strain and by him delivered to plaintiff, Fred Stebler, and Austin A. Gamble, the said Robert Strain did sell, assign, transfer and set over unto plaintiff and the said Austin A.

Gamble the full and exclusive right, title and interest in and to the said invention and in and to the letters patent to be granted and issued therefor and did authorize and request the Commissioner of Patents to issue said letters patent jointly to plaintiff and the said Austin A. Gamble; that said instrument in writing was prior to June 9, 1903, duly and regularly recorded in the United States Patent Office; that thereafter such proceedings were duly and regularly had and taken in the matter of such application that, to wit, on June 9th, 1903, Letters Patent of the United States of America, No. 730,412, were duly and regularly granted and issued and delivered by the Government of the United States of America to your orator and the said Austin A. Gamble, whereby there was granted and secured to your orator and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17), from and after said 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending to others to be used the said invention throughout the United States of America and the territories thereof; that the said letters patent were duly issued in due form of law under the seal of the United States Patent Office and duly signed by the Commissioner of Patents, all as will more fully appear from said original letters patent or a duly certified copy thereof which are ready in court to be produced by your [10] orator, as may be required; and that prior to the grant, issuance and deliverance of the said letters patent all proceedings were had and taken which were required by law

to be had and taken prior to the issuance of letters patent for new and useful inventions.

#### IV.

And your orator further shows unto your Honors that on October 12th, 1903, the said Robert Strain and your orator and the said Austin A. Gamble discovered for the first time that the said letters patent were inoperative and insufficient and that the errors which rendered said letters patent No. 730,412 so inoperative and insufficient arose from the inadvertence, accident and mistake of the Commissioner of Patents of the United States and without any fraudulent intention on the part of the said Robert Strain or upon the part of your orator, or upon the part of said Austin A. Gamble; that said inadvertence, accident and mistake upon the part of the said Commissioner of Patents of the United States consisted in this, that after the said Robert Strain had duly filed in the United States Patent Office his application for letters patent upon the said fruit grader, as aforesaid, one Charles Rayburn, did on August 18th, 1902, file in the United States Patent Office an application for letters patent upon said new and useful fruit grader and in said application did make certain claims as the original, true and first inventor thereof; that through the inadvertence, accident and mistake of the Commissioner of Patents a patent was issued to the said Charles Rayburn therefor, said letters patent being numbered 726,756, and were granted, issued and delivered to the said Charles Rayburn on April 28th, 1903, and while the said Robert

Strain's application for letters patent pending in the United States Patent Office, as aforesaid, [11] and the Commissioner of Patents did by inadvertence, accident and mistake fail and neglect to give notice to the said Robert Strain, or your orator, or said Austin A. Gamble, of said Charles Rayburn's application for letters patent upon said fruit grader, and did fail and neglect to declare an interference proceeding between said Robert Strain and Charles Rayburn or the application of said Robert Strain and Charles Rayburn for letters patent upon said fruit grader, and did fail and neglect to determine whether the said Robert Strain or the said Charles Rayburn was the original, first and sole inventor of said fruit grader, and did fail and neglect to determine the question of priority of invention between said Robert Strain and said Charles Rayburn; that said Robert Strain and your orator and the said Austin A. Gamble first discovered this inadvertence, accident and mistake upon the part of the Commissioner of Patents on October 12th, 1903, and did forthwith and immediately direct their attorneys to prepare an application for a reissue patent upon said Robert Strain's said invention in fruit grader; that said Robert Strain did make due application in writing, in due form of law, for a reissue of said letters patent, which said application was filed in the United States Patent Office on October 21st, 1903, by the said Robert Strain with the full consent and allowance of your orator and the said Austin A. Gamble, and that thereafter due proceedings were

had in the United States Patent Office in accordance with the statutes in such cases made and provided, and in accordance with the rules of the United States Patent Office, and that said Robert Strain was adjudged to be the original, first and sole inventor of said fruit grader and judgment of priority of invention was rendered and entered in the United States Patent Office in favor of Robert Strain and against said Charles Rayburn; and [12] thereafter, to wit, on December 27th, 1904, the said Robert Strain and your orator and the said Austin A. Gamble having in all respects complied with the Acts of Congress in such case made and provided, and having surrendered the said original letters patent No. 730,412, said letters patent were cancelled and new or amended letters patent which were marked "Reissue No. 12,297" were on the 27th day of December, 1904, in due form of law, granted, issued and delivered to your orator and the said Austin A. Gamble, which said reissue letters patent are of record in the Patent Office of the United States, as will more fully and at large appear from said original reissued letters patent or a duly certified copy thereof ready here in court to be produced, whereby there was granted and secured to your orator and the said Austin A. Gamble, their heirs, legal representatives and assigns, for the full term of seventeen years (17), from and after the 9th day of June, 1903, the sole and exclusive right, liberty and privilege of making, using and vending the said invention as described and claimed in said reissued letters patent throughout the United States of America and the territories thereof.

## V.

And your orator further shows unto your Honors that the said invention so set forth, described and claimed in and by the said letters patent aforesaid is of great value and has been extensively practiced by your orator and by your orator and the said Austin A. Gamble, and that since the grant, issuance and delivery of the said letters patent the said fruit grader has gone into great and extensive use and your orator and said Austin A. Gamble have sold large numbers thereof and the same has subsequently displaced all other forms of devices for said purpose and become the standard fruit grader, and upon each and [13] every one of said fruit graders manufactured, used or sold by your orator or by your orator and said Austin A. Gamble, as aforesaid, your orator, and your orator and the said Austin A. Gamble have marked in bold and conspicuous letters the word "Patented" together with the day and date of issuance of said letters patent, to wit, June 9th, 1903, and December 27th, 1904, thereby notifying the public of said letters patent, and the trade and public have generally respected and acquiesced in the validity and scope of said letters patent and of the exclusive rights of your orator, and of your orator and said Austin A. Gamble therein and thereunder, and but for the wrongful and infringing acts of defendant, as hereinafter set forth, your orator would now continue to enjoy the said exclusive rights and the same would be of great and incalculable benefit and advantage of your orator, and the said defendant

has been, long prior to the commencement of this suit, notified in writing of the great, issuance and delivery of the said letters patent and of the rights of your orator thereunder, and has had full knowledge of your orator's said rights under said letters patent, and demand has been made upon defendant to respect the said letters patent and not to infringe thereon, but notwithstanding such notice the defendant have continued to make, use and sell fruit graders embodying the said invention, as herein-after more particularly set forth.

## VI.

Your orator further shows unto your Honors that heretofore, to wit, prior to the first day of January, 1910, by an instrument in writing in due form of law, duly signed by the said Austin A. Gamble, and delivered by him to your orator, the said Austin A. Gamble did sell, assign, transfer and set over unto your orator, his heirs and assigns, all his right, title [14] and interest in and to the said fruit grader invention and in and to the said letters patent aforesaid granted and issued therefor, and did thereby sell, assign, transfer and set over unto your orator, and vest in your orator, and your orator did become the sole and exclusive owner of the full and exclusive right, title and interest in and to the said fruit-grader invention and in and to the letters patent granted and issued therefor, all as will more fully and at large appear from said original instrument in writing or a duly certified copy thereof ready in court to be produced as may be required.

## VII.

That heretofore, to wit, in May, 1910, plaintiff filed in the United States Circuit Court for the Southern District of California, his certain Bill of Complaint in Equity wherein plaintiff and complainant and Riverside Heights Orange Growers Association and George D. Parker were defendants; that in said Bill of Complaint the invention of Robert E. Strain of the fruit grader hereinbefore referred to and the various proceedings herein before set forth had and taken by said Robert Strain and plaintiff and plaintiff's assignor, Austin A. Gamble, in the United States Patent Office eventuating in the grant, issuance and delivery of the letters patent reissue No. 12,297 were set up and pleaded and the assignment of said reissued letters patent to plaintiff and plaintiff's ownership thereof were likewise pleaded; that the infringement thereof by defendants, Riverside Heights Orange Growers Association and George D. Parker, by the making, selling and using of machines embodying and containing said invention in infringement of plaintiff's rights under said letters patent and without the license, consent or authority of plaintiff was pleaded and set up and an injunction prayed against the continuance by defendants [15] or either of them of such infringement and for the recovery of profits and damages, all as in and by said original Bill of Complaint or a duly certified copy thereof in court ready to be produced, and may be required, will more fully and at large appear; that thereafter defendants filed their Answer and said Bill of Complaint and suit were determined on the

pleading and proofs adduced and an interlocutory decree and a final decree entered by this Court in said cause ordering, adjudging and decreeing that said reissue letters patent No. 12,297 and claims 1 and 10 thereof in particular were valid and had been infringed by said defendants and that plaintiff was the sole owner thereof, and that said defendants be enjoined as prayed for in the Bill of Complaint all as more fully and at large will appear from said original Answer, Interlocutory Decree, Final Decree and files, records and proceedings of this Court in said suit ready in court to be produced as may be required.

### VIII.

That heretofore, to wit, prior to May 12, 1908, plaintiff was the original, first and sole inventor of a certain new and useful distributing apparatus, and on that day made application in due form of law to the Government of the United States for the grant, issuance and delivery to him of letters patent of the United States therefor; that after due proceedings had and taken thereafter, to wit, on December 21, 1909, letters patent of the United States No. 943,799 were granted, issued and delivered to him in due form of law by the Government of the United States, that thereby there was granted and secured to plaintiff, his heirs, legal representatives and assigns the sole and exclusive right, liberty and privilege of making, using and vending the said invention throughout the United States of America and the territories thereof during the period of seventeen [16] years (17) from and after December 21, 1909, all as in and by said original letters patent or a duly certified copy

thereof ready in court to be produced as may be required will more fully and at large appear; that a more particular description of the said invention patented in and by said letters patent will fully appear in and from the said letters patent.

## IX.

That the trade and public have generally acquiesced in and acknowledged the validity of said reissued letters patent No. 12,297, and said letters patent No. 943,799, in and to the exclusive rights of plaintiff thereunder and under each thereof.

## X.

That the said fruit graders set forth, described and claimed and covered in and by said reissue letters patent No. 12,297, and the said distributing apparatus set forth in and by said letters patent No. 943,799, are capable of embodiment in and conjoint use in one and the same apparatus and are so embodied in and conjointly used in each of the machines and apparatus caused to be made and used by defendant; that all of the fruit graders and all of the distributing apparatus manufactured, used or sold by plaintiff, or manufactured, used or sold by plaintiff's assignors or licensees, have been marked with the word "Patented" together with the day and date of said respective letters patent, to wit, "December 27th, 1904, and December 21st, 1909," respectively; and the said defendant has been notified in writing by plaintiff that the machines and apparatus caused to be made and used by defendant are infringements of said letters patent, and each thereof, and demand has been made upon said defendant to cease the making

or use thereof; that defendant refuses to refrain from using said infringing machines and apparatus.

[17]

## XI.

That heretofore, to wit, on August 29th, 1910, plaintiff filed in the United States Circuit Court for the Southern District of California in an action at law, his DECLARATION OF TRESPASS on the case wherein this plaintiff was plaintiff and the Pioneer Fruit Company was defendant; that in said declaration the invention by Robert Strain of the fruit grader herein before referred to and the various proceedings hereinbefore set forth, had and taken by said Roberts Strain and by your orator and your orator's said assignor, Austin A. Gamble, in the United States Patent Office eventuating in the grant, issuance and delivery of said reissue letters patent No. 12,297 were set up and pleaded and the assignment of said reissued letters patent to plaintiff and plaintiff's ownership thereof were likewise pleaded; that prior to August 29th, 1910, the defendant, Pioneer Fruit Company, had caused to be made and used machines conjointly, embodying and containing said invention in infringement of your orator's rights in and under said respective patents and without the license, consent or authority of plaintiff and damages because of such infringement were demanded, all as in and by said original Declaration or a certified copy thereof ready in court to be produced will more fully and at large appear; that defendant, Pioneer Fruit Company, duly appeared and answered in said action at law and that said action at law was on June

28th, 1911, called for trial before his Honor Olin Wellborn, United States District Judge, without a jury, a jury having been waived by the parties, and on July 10th, 1911, this court filed its Findings of Fact and Conclusions of Law, wherein it was found that Robert Strain was the original, first and sole inventor of the fruit grader set forth in claims 1 and 10 of said reissue patent and that said reissue letters [18] patent, and said claims 1 and 10 thereof in particular, were valid letters patent and claim; that plaintiff was the owner of said letters patent; that the machines caused by the defendant, Pioneer Fruit Company, to be made and used prior to August 29th, 1910, were and are infringements upon said letters patent and upon each of the claims thereof specifically referred to in this paragraph of this Bill of Complaint, and that plaintiff was the owner of the exclusive right to said respective letters patent and was entitled to judgment against defendant for the sum of Three Hundred and Seventy-seven Dollars (\$377) and costs, by reason of such infringement, and judgment for said sum was entered and docketed in favor of this plaintiff and against said defendant, all as will more fully and at large appear as in and by the Findings of Fact and Conclusions of Law and judgment rendered in said action at law, No. 207, aforesaid, the original of which or duly certified copies, are ready in court to be produced as may be required.

## XII.

That since the grant, issuance and delivery of said letters patent respectively and within the six

months last past and within the Southern District of California, the defendant without the license or consent of plaintiff has caused to be made and is now engaged in using machines and apparatus embodying the said respective patented inventions patented in and by said respective letters patent, and that each of the machines so caused to be made and so used and now being used by defendant as aforesaid contains within it each of the said respective purposes and defendant intends to continue the use of said machines and apparatus embodying the said respective inventions in defiance of and without the license or consent of plaintiff under either of said letters patent, and will continue so to do unless restrained [19] and enjoined by this Court, and has realized and is now realizing large profits and advantages from said infringement and unlawful acts, and plaintiff has suffered and is suffering great and irreparable damage and injury; that the exact amount of such profit or of such damage is to plaintiff unknown, and plaintiff therefore prays that an accounting may be taken of the profits, advantages and damages, and that defendant be ordered and directed to account to and pay over to plaintiff the profits so realized by defendant and the damages suffered by plaintiff by reason of such unlawful acts.

### XIII.

That plaintiff has requested defendant to cease and desist from infringing upon said letters patent and to account to plaintiff for said profits and damages, and to cease the use of such infringing machines and apparatus, but that defendant has di-

rectly refused so to do and has refused to comply with such request or any part thereof.

#### XIV.

That for a valuable consideration to defendant in hand paid and received by the defendant, the defendant has covenanted and agreed that each of said letters patent are valid and has acquiesced in the validity of each of the said letters patent by an instrument in writing executed by defendant and by defendant delivered to plaintiff and is thereby estopped from denying the validity of either of said letters patent.

WHEREFORE plaintiff prays: 1. That upon the filing of this Bill a preliminary injunction be granted to plaintiff enjoining and restraining the defendant, its officers, attorneys, servants, employees, agents, workmen and associates and each and every thereof from making, selling [20] or using or offering for sale or advertising or contracting to make or use in any manner directly or indirectly any machine or device or apparatus containing either of the inventions patented in or by said respective letters patent reissue No. 12,297 and No. 943,799 aforesaid, or any machine or device capable of being used in infringement of either of said letters patent and from directly or indirectly infringing upon said letters patent in any manner whatsoever and from aiding, abetting or contributing to in such infringement whatsoever, and that said writ of injunction be issued out of and under the seal of this Court and upon the final hearing the said writ of injunction be made permanent and final.

2. That it be ordered, adjudged and decreed that plaintiff have and recover from defendant all the profits and advantages realized by the defendant and all the damages sustained by the plaintiff by reason of the infringement aforesaid, together with the costs of said suit and such other further or different relief as to this Court may seem proper and be in accord with equity and good conscience.

FRED STEBLER.

FREDERICK S. LYON,

Solicitor and of Counsel for Plaintiff. [21]

State of California,

County of Riverside,—ss.

Fred Stebler, being first duly sworn, on oath says that he is the plaintiff in the above-entitled suit and has read the foregoing Bill of Complaint and knows the contents thereof; that the same is true to his own knowledge.

FRED STEBLER.

Subscribed and sworn to before me, this 3d day of November, 1915, at Riverside, California.

M. J. TWOGOOD,  
Notary Public in and for the County of Riverside,  
State of California.

[Endorsed]: No. A-44-Eq. United States District Court, Southern District of California, Northern Division. Fred. Stebler, Plaintiff, vs. Porterville Citrus Association, Defendant. In Equity. Bill of Complaint. Filed Nov. 4, 1915. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust

Building, Los Angeles, Cal., Solicitor for Plaintiff.  
[22]

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*In the United States District Court, Southern District of California, Northern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Plaintiff,

vs.

PORTEVILLE CITRUS ASSOCIATION,  
Defendant.

**Answer.**

Now comes the defendant to the above-entitled suit and for answer to the plaintiff's bill of complaint herein denies, admits and avers as follows:

I.

Admits that the ground upon which the Court's jurisdiction depends is that this is a suit in equity arising under the patent laws of the United States.

II.

Admits that the defendant, Porterville Citrus Association, is a corporation organized and existing under and by virtue of the laws of the State of California, and has its principal place of business at Porterville, California.

III.

Admits the allegations contained in Paragraphs III and IV of the bill of complaint herein on file.

IV.

Admits the allegations contained in Paragraph V of the bill of complaint herein on file, excepting in so far as the same alleges that the invention of re-

issue letters patent No. 12,297 has displaced all other forms of devices for the purposes set forth in the [23] said letters patent, and that the same has become the standard fruit grader; and denies in this connection that it has manufactured, used or sold fruit graders embodying the said invention; and denies that but for the acts of this defendant, the plaintiff herein would now continue to enjoy any exclusive right which would be of great and incalculable benefit and advantage to the plaintiff, as set forth in paragraph V of the bill of complaint herein on file.

### V.

Answering paragraphs VI and VII of the bill of complaint herein on file defendant avers that it has no knowledge, information or belief on the subject thereof sufficient to enable it to make answer to the allegations thereof, or any of them, and leaves plaintiff to make such proof thereof as he may be advised is proper.

### VI.

Denies that in any manner whatsoever it has infringed, either by making, using or selling fruit-grading machinery, any of the rights conferred upon the plaintiff herein by protection afforded under the claims of the said reissue letters patent No. 12,297.

### VII.

And for a further and separate defense in respect to the said reissue letters patent No. 12,297, defendant avers that, by reason of the prior state of the art as it existed long prior to the date of the alleged invention of the said reissue letters patent No. 12,297, the said invention embraced in the said alleged re-

issue letters patent is so restricted as to preclude the fruit grader used by the defendant falling within the protection afforded by the claims of the said reissue letters patent; and in this connection the defendant alleges the prior art to be set forth and disclosed by the following letters patent: [24]

Name of Patentee.	Number of Patent.	Date of Patent.
H. H. Hutchins	456,092	July 14, 1891
H. B. Stevens	247,428	Sept. 20, 1881
J. T. Ish	458,422	Aug. 25, 1891
J. A. Jones	430,031	Oct. 10, 1890
M. P. Richards	654,281	July 24, 1900
H. H. Hutchins	456,092	July 14, 1891
A. Cerruti	534,783	Feb. 26, 1895
J. J. White	731,828	June 23, 1903
B. H. Vellines	364,977	June 14, 1887
C. D. Nelson	713,484	Nov. 11, 1902

### VIII.

Answering Paragraph VIII of the bill of complaint herein on file, defendant avers that it has no knowledge, information or belief on the subject thereof sufficient to enable it to make answer to the allegations thereof, or any of them, and leaves plaintiff to make such proof thereof as he may be advised is proper.

### IX.

Denies that the trade and public have generally acquiesced in and acknowledged the validity of the said reissue letters patent No. 12,297 and letters patent No. 943,799, in and to the exclusive rights of plaintiff thereunder and under each thereof.

## X.

Denies that the fruit grader set forth, described and claimed and covered in and by reissue letters patent No. 12,297, and the distributing apparatus set forth in and by said letters patent No. 943,799, are capable of embodiment and conjoint use in one and the same apparatus; and denies that the same are so embodied and conjointly used in the machines and apparatus used [25] by this defendant; and denies that it has refused to refrain from using any machine which is an infringement of the protection afforded by either or both of the said letters patent.

## XI.

Answering paragraph XI of the bill of complaint herein on file, defendant avers that it has not sufficient knowledge, information or belief on the subject thereof to enable it to make answer to the allegations thereof, or any of them, and leaves plaintiff to make such proof thereof as he may be advised is proper.

## XII.

Denies that it has caused to be made and is now engaged in using machines and apparatus embodying said respective patented inventions patented in and by the said reissue letters patent No. 12,297 and letters patent No. 943,799 set forth in the bill of complaint herein on file; and denies that the machine which it is now using contains within it the invention or inventions of each of the said respective letters patent; and denies that it intends to continue the use of any machine or apparatus which has embodied therein the respective inventions of the said letters patent; and denies that it will continue to use any

machine or machines infringing either or both of the said letters patent unless restrained and enjoined by this Court; and denies that it has realized and is now realizing large profits and advantages from said alleged infringing and unlawful acts; and denies that the plaintiff has suffered and is now suffering great and irreparable damage and injury by reason of any act committed by this defendant, as set forth in paragraph XII of the bill of complaint herein on file.

### XIII.

Denies that it has refused and still refuses to account to the plaintiff herein for any profits and damages resulting by any [26] act of infringement committed by this defendant; and in this connection denies that it has committed any such act of infringement.

### XIV.

Answering paragraph XIV of the bill of complaint on file herein, defendant avers that it has not sufficient knowledge, information or belief on the subject thereof to enable it to make answer to the allegations thereof, and therefore leaves the plaintiff to make such proof thereof as he may be advised is proper.

### XV.

And for a further and separate defense in respect to the alleged letters patent No. 943,799 in suit herein, defendant avers that Fred Stebler, mentioned in the bill of complaint as the inventor of the device patented in and by said letters patent, was not the original, first or sole inventor of the thing sought to be patented in and by said letters patent No. 943,799,

or any material or substantial part thereof; but on the contrary, long prior to and before the alleged invention or discovery thereof by the said Fred Stebler, the thing attempted to be patented in and by said letters patent had been patented in and by certain letters patent issued by the Government of the United States on the following named dates and bearing the following numbers, viz.:

Name of Patentee.	Number of Patent.	Date of Patent.
W. C. Anderson	Reissue 12,459	Feb. 27, 1906.
H. A. Beekhuis	906,605	Dec. 15, 1908.
Thomas Strain	775,015	Nov. 15, 1904.
C. Rayburn	741,928	Oct. 20, 1903.
G. D. Parker	958,164	May 17, 1910.
F. F. Backstrom	835,805	Nov. 13, 1906.

## XVI.

That the said Fred Stebler was not the original, or first, [27] or sole inventor of the thing sought to be patented in and by said letters patent No. 943,799, or any material or substantial part thereof, but that long prior to the date of the supposed invention and discovery thereof by the said Fred Stebler, the same was known to and used by various persons and corporations whose names are at this time unknown to this defendant and cannot be specified at this time, and defendant prays leave of the Court to amend this answer by specifying the names of such parties as soon as defendant ascertains them.

## XVII.

And further answering, defendant avers upon information and belief that the said letters patent No. 943,799, mentioned in plaintiff's bill of complaint herein on file, are void and of no effect for the reason

that it did not require the exercise of the inventive faculty to produce the same, but only mechanical skill such as is possessed by persons skilled in the particular art to which the same refers.

WHEREFORE, having fully answered, defendant prays to be hence dismissed with its costs in this behalf sustained.

N. A. ACKER,  
Attorney for Defendant. [28]

State of California,  
County of Tulare,—ss.

John A. Milligan, being first duly sworn, on oath says: That he is the Secretary and Manager of the defendant corporation in the above-entitled suit, and that he has read the foregoing answer to the plaintiff's bill of complaint herein; that the same is true of his own knowledge except as to such matters and things as are therein stated on information and belief, and that as to the latter, he believes the same to be true.

JOHN A. MILLIGAN.

Subscribed and sworn to before me this 27 day of November, 1915.

[Seal] I. F. WRIGHT,  
Notary Public in and for the County of Tulare, State  
of California.

[Endorsed]: In Equity—No. A-44. U. S. District Court, Southern District of California, Northern Division. Fred Stebler, Plaintiff, vs. Porterville Citrus Association, Defendant. Answer. Filed Dec. 3, 1915. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Nicholas A. Acker, At-

torney at Law, Foxcroft Building, 68 Post Street,  
San Francisco, Cal., for Defendant. [29]

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*In the United States District Court, Southern Dis-  
trict of California, Northern Division.*

IN EQUITY—No. A-44.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

**Amendment to Answer.**

The Answer of the defendant on file herein is hereby amended as follows:

Page 3 of the Answer, between lines 12 and 14 thereof insert—

R. M. Widney.....788,619.....May 2, 1905.

Further answering this defendant denies that the said Robert Strain was the original, first or sole inventor or any inventor at all of the thing sought to be patented in and by said reissue letters patent No. 12,297 or any material or substantial part thereof, and in this connection states that long prior to the supposed invention or discovery thereof by the said Robert Strain, the same was known to and used by the following persons and corporations, viz: Robert M. Widney of Fernando, State of California; Howard B. Stevens of Citra, County of Marion, State of Florida; M. A. Rice of Citra, County of Marion, State of Florida; R. C. Douglass of Citra, County of Marion, State of Florida; J. C. Greener of Citra,

County of Marion, State of Florida; A. S. Kells of Citra, County of Marion, State of Florida; Thordike C. Jameson of Corona, County of Riverside, State of [30] California; F. E. Proud of La Habra, State of California; used in the packing-house of W. H. Jameson, situated at Corona, County of Riverside, State of California, and was known to various other persons and corporations whose names and addresses are at this time unknown to this defendant and cannot be stated at this time, but defendant prays leave of the Court to amend this Answer by specifying the names of such parties as soon as the defendant ascertains the same.

Page 6, line 5, erase the word "various" and insert—H. A. Beekhuis of Hanford, Fresno County, State of California; L. E. Tucker of Upland, State of California; George D. Parker, of Riverside, County of Riverside, State of California; used by the California Fruit Canners Association in its packing-house situated at Hanford, County of Fresno, State of California; used by the Arlington Heights Fruit Company in its packing-house situated at Arlington, County of Riverside, State of California; used by the Upland Citrus Association in its packing-house situated at Upland, State of California, and known to and used by various other—

PORTERVILLE CITRUS ASS.

By N. A. ACKER,

Solicitor and Counsel for Deft. [31]

[Endorsed]: No. A-44. U. S. District Court, Southern District of California, Northern Division. Fred Stebler, Plaintiff, vs. Porterville Citrus Asso-

ciation, Defendant. Amendment to answer. Feby. 4, 1916. Received a copy of the within Amendment and same is stipulated and consented to. Frederick S. Lyon, Solr. for Plaintiff. Filed Apr. 4, 1916. Wm. M. Van Dyke, Clerk. By R. S. Zimmerman, Deputy Clerk. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [32]

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At a stated term, to wit, the July Term, A. D. 1916, of the District Court of the United States of America, in and for the Southern District of California, Northern Division, held at the court-room thereof, in the city of Los Angeles, on Tuesday, the first day of August, in the year of our Lord one thousand nine hundred and sixteen. Present: The Honorable OSCAR A. TRIP-PET, District Judge.

Nos. A-44—EQUITY and A-50—EQUITY, Combined for Final Hearing.

FRED STEBLER,

Complainant,

vs.

PORTEVILLE CITRUS ASSOCIATION,  
Defendant.

**Minute Order of August 1, 1916.**

Frederick S. Lyon, Esq., appearing as counsel for complainant, and no one appearing on behalf of defendant; Helena L. Hill and A. S. Custer being present as shorthand reporters of the proceedings, and acting as such; these combined causes having hereto-

fore been submitted to the Court for its consideration and decision, on the pleadings and proofs; the Court, having duly considered the same and being fully advised in the premises, now orally announces its conclusions, and it is ordered that counsel for complainant prepare in each cause a decree in accordance with the conclusions announced by the Court, granting the prayer of the Bill of Complaint as to infringement of the Stebler patent, except claim 4 thereof, and denying infringement of the Thomas Strain and Robert Strain patents; and it is further ordered, on  
Amended by Order of Dec. 12, 1916. motion of Frederick S. Lyon, Esq., of counsel for complainant, that all exhibits ~~used for illustrative purposes, other than exhibits filed,~~ may be removed from the clerk's office and returned to the storage warehouse from which they were brought to the court. [33]

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*United States District Court, Southern District of California, Northern Division.*

IN EQUITY—A-44.

FRED STEBLER,

Plaintiff,

vs.

POTERVILLE CITRUS ASSOCIATION,  
Defendant.

**Decree.**

The above-entitled suit, having come on regularly for hearing upon the evidence and proofs educed on behalf of the respective parties, Frederick S. Lyon, Esq., appearing on behalf of plaintiff and N. A.

Acker, Esq., on behalf of defendant, now upon due consideration thereof, it is

**ORDERED, ADJUDGED AND DECREED,**

1. That reissue letters patent of the United States No. 12,297, dated Dec. 27, 1904, are good and valid in law, particularly as to claims 1 and 10 thereof, and that plaintiff, Fred Stebler, is the owner thereof and of all the rights and privileges granted and secured thereby.
2. That letters patent of the United States No. 943,799, dated Dec. 21, 1909, are good and valid in law, particularly as to claims 1, 2, 3, 5, 6, 7, 8, 11, 14, 15 and 19; that plaintiff is the owner thereof and of all the rights and privileges granted and secured thereby. [34]

3. That the respective inventions set forth, described and claimed in and by said reissue letters patent No. 12,297 and said letters patent No. 943,799, are capable of embodiment in and conjoint use in one and the same apparatus or machine; that all the fruit graders and all of the distributing apparatus manufactured, used or sold by plaintiff or by plaintiff's assignors or licensees have been plainly and conspicuously marked with the word "Patented," together with the day and date of said respective letters patent, to wit, Dec. 27, 1904, and Dec. 21, 1909; that defendant prior to installing the machines hereinafter found to be an infringement was notified in writing by plaintiff that said machines were an infringement of said respective letters patent, and demand was made upon defendant that defendant cease the completion of said machines or the use thereof; that de-

fendant refused to refrain from using said infringing machines or any thereof.

4. That defendant has infringed upon said reissue letters patent No. 12,297, particularly as to claims 1 and 10 thereof and upon said letters patent No. 943,-799, particularly as to claims 1, 2, 3, 5, 6, 7, 8, 11, 14, 15 and 19 thereof by causing to be erected in its packing-house at Porterville, California, by George D. Parker, of Riverside, California, and without the license or consent of plaintiff or plaintiff's assignor, certain fruit grading and distributing machines and using the same therein; that each of said combined fruit grading and distributing machines contains in it the invention set forth, described and claimed in and by said reissue letters patent No. 12,297, as particularly set forth in claims 1 and 10 thereof, and the invention set forth, described and claimed in and by said letters patent No. 943,799, as particularly set [35] forth in claims 1, 2, 3, 5, 6, 7, 8, 11, 14, 15, and 19 thereof; that this suit has been defended on behalf of defendant by and at the cost and expense of said George D. Parker, the manufacturer of said infringing machines.

5. That a perpetual injunction issue out of and under the seal of this Court directed to said defendant, Porterville Citrus Association, its officers, attorneys, agents, servants, workmen, clerks and associates, enjoining and restraining them and each and every of them from in any manner making, selling using or offering for sale, or advertising or contracting to make or use or sell or dispose of in any manner whatsoever, either directly or indirectly, any machine

or device or apparatus containing either the invention set forth, described and claimed in or by said reissue letters patent No. 12,297, as particularly set forth in claims 1 and 10 thereof, or in or by said letters patent No. 943,799, particularly as set forth in claims 1, 2, 3, 5, 7, 8, 11, 14, 15 and 19 thereof or any machine or device capable of being used in infringement of either of said letters patent, and from directly or indirectly infringing upon either of said letters patent in any manner whatsoever, or from aiding or abetting or contributing to any such infringement in any manner whatsoever, and from any further use of the said machine so installed in its said packing-house at Porterville, California, by said George D. Parker; and from at any time whatsoever in any manner making use of those certain adjustable means whereby the roller sections may be adjusted toward or away from the grading belt; and from maintaining in any of said machines the slotted brackets by means of which the roller sections are supported unless the slots of such brackets are permanently sealed by some substance such as babbitt metal permanently fixing said brackets and rollers against adjustment. [36]

6. That complainant do have and recover judgment against defendant, Porterville Citrus Association, for the sum of \$333.32, plaintiff's costs and disbursements in this suit.

Dated Los Angeles, California, November 20, 1916.

OSCAR A. TRIPPET,

District Judge.

Decree entered and recorded November 20th, 1916.

WM. M. VAN DYKE,

Clerk.

By Chas. N. Williams,

Deputy Clerk.

[Endorsed]: No. A-44. United States District Court, Southern District of California, Northern Division. Fred Stebler, Plaintiff, vs. Porterville Citrus Association, Defendant. In Equity. Decree. Filed Nov. 20, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. Frederick S. Lyon, 504-7 Merchants Trust Building, Los Angeles, Cal., Solicitor for Plaintiff. [37]

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*In the United States District Court, Southern District of California, Northern Division.*

EQUITY SUIT—A-44.

FRED STEBLER,

Plaintiff,

vs.

PORTEVILLE CITRUS ASSOCIATION,  
Defendant.

**Notice of Taking Testimony.**

To Fred Stebler and Frederick S. Lyon, Esq., His  
Solicitor, Merchants Trust Building, Los An-  
geles, California.

Gentlemen:

Please take notice that the defendant herein will  
take testimony of Howard B. Stevens; M. A. Rice;  
R. C. Douglass; J. C. Greener; A. S. Kells; H. M.  
Eichelberger; A. S. Lambert and J. W. Hagins, all

of whom reside at Citra, county of Marion, in the State of Florida, and probably others, for use on behalf of defendant at the trial of the above-entitled cause, before R K. Wartman, a notary public in and for the county of Marion, State of Florida (or some other officer authorized by law to take depositions), and not of counsel or attorney to either of the parties, nor interested in the event of this cause, at the office of said R. K. Wartmann, No. ——, at Citra, county of Marion, State of [38] Florida, on Tuesday, the 21st day of March, 1916, commencing at 10:30 o'clock in the forenoon; all of said witnesses residing more than one hundred miles from the place of trial herein and more than one hundred miles from any place at which a District Court of the United States for the Southern District of California, is appointed to be held by law.

Such testimony will be taken in accordance with the provisions of Sections 863, 864 and 865 of the Revised Statutes of the United States. Adjournment will be taken from day to day and at such times and place as may be necessary for the taking of the depositions without further notice.

You are invited to attend and cross-examine.

Very respectfully,

N. A. ACKER,

Solicitor and of Counsel for Defendant.

San Francisco, California, March 6, 1916.

[Endorsed]: No. A-44. U. S. District Court, Southern District of California, Northern Division. Fred Stebler, Plaintiff, vs. Porterville Citrus Association, Defendant. Notice of Taking Testimony.

Received a copy of the within notice this 8th day of March, 1916. Frederick S. Lyon, Solicitor for Complainant. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for Defendant. [39]

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*In the United States District Court, Southern District of California, Northern Division.*

EQUITY SUIT—A-44.

FRED STEBLER,

Plaintiff,

vs.

PORTEVILLE CITRUS ASSOCIATION,  
Defendant.

**Depositions Taken at Citra, Florida, March 21, 1916.**

Testimony taken on behalf of defendant for use on final hearing in the above-entitled cause, said testimony being taken in accordance with the Equity Rules of the United States Supreme Court, and under the provisions of Sections 863, 864, and 865 of the Revised Statutes of the United States.

Parties met pursuant to the annexed notice of taking testimony at the office of R. K. Wartmann, the officer named in the notice for the taking of the testimony, and adjourned to the rooms of the White House Hotel at Citra, Florida, this twenty-first day of March, 1916.

It is hereby stipulated by and between counsel for the respective parties to the above-entitled cause that the testimony taken in the foregoing suit No. A-44 may be used with the same force and effect in the suit No. A-45 pending in this court and en-

titled Fred Stebler vs. Mid-California Citrus Association, Defendant, A-45, and equally so in suit pending in this court entitled Fred Stebler vs. Porterville Citrus Association, Defendant, No. A-50, complainant to said action, however, reserving unto himself all exceptions [40] which may be had and taken to the testimony given in the foregoing suit A-44. A carbon copy of testimony given in the present case A-44 shall be filed as testimony in the cases. A-45 and A-50 first page of the carbon copies in said cases A-44 and A-50 to be properly entitled and identified by case number.

Present on behalf of Complainant, L. W. BALDWIN, Esq.

Present on behalf of Defendant, NICHOLAS A. ACKER, Esq.

It is stipulated that the notary need not remain in the room throughout the taking of the testimony of witnesses.

It is hereby stipulated by and between parties to the foregoing cause that printed uncertified copies of United States letters patent may be used throughout the taking of the depositions of witnesses and introduced in evidence in connection with said depositions, and to be hereinafter withdrawn and replaced by a duly certified copy.

#### **Deposition of Howard B. Stevens, for Defendant.**

HOWARD B. STEVENS, a witness produced on behalf of defendant, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testifies in response to interrogatories propounded by counsel for the defendant as follows:

(Deposition of Howard B. Stevens.)

Q. 1. Will you please state your name, age, residence and occupation?

A. Howard B. Stevens, age, 65, DeLand, Fla., general manager of the Stetson Estate.

Q. 2. Please state in general the character of your work as manager of the Stetson estate and for what length of time you have occupied such position.

A. The bulk of my duties raising and marketing oranges. [41]

Q. 3. You have only partly answered the previous question and I will ask that the same will be reread to you. A. Nearly 17 years.

Q. 4. For what length of time have you resided at DeLand, Florida? A. 17 years.

Q. 5. Where did you reside prior to moving to DeLand, Florida? A. Citra, Florida.

Q. 6. And for what length of time did you reside at Citra, Florida? A. About 24 years.

Q. 7. What business, if any at all, were you engaged in at Citra, Florida? A. Raising oranges.

Q. 8. Were your duties solely in connection with the raising of oranges?

A. Many of my vacations were spent in making orange sizers.

Q. 9. You state many of your vacations were spent in making orange sizers, and I will ask you for what purpose were said sizers made, and what disposition was made of the said sizers.

A. They were made for the grading and sizing of the fruit.

Q. 10. Were the sizers so made used solely by yourself?

(Deposition of Howard B. Stevens.)

A. No, sold a great many through the State.

Q. 11. Can you give at this time the names of any of the parties to whom said sizers were sold, and during what years the same were so sold?

A. In 1880 I sold to the Bishop and Hoyt Company, J. A. Harris, Adam Eichelberger, and F. G. Sampson, B. P. Bishop, Clifford Orange Company. I sold every year up to 1894, but do not remember the parties.

Q. 12. Were the parties numerated by you in your last answer located at Citra, Florida, and if not, please state [42] where they were located?

A. All but Eichelberger, Sampson, and B. P. Bishop were located in Citra; Eichelberger in Ocala, F. G. Sampson, Boardman, B. P. Bishop, San Mateo, Florida.

Q. 13. Are the places that you have enumerated located or situated nearby or adjacent to Citra?

A. Ocala and Boardman are in the same county, San Mateo in Putnam County.

Q. 14. Please state what prominence, if any at all, Citra occupied in connection with the fruit industry of the State of Florida.

A. Prior to the freeze of '94 it was considered the largest fruit shipping point in the State.

Q. 15. Am I correct from your previous answer that in my understanding that prior to the year 1894, Marion County, in which Citra is situated, constituted the banner county of this State—relative to the fruit industry?

A. I so considered it.

(Deposition of Howard B. Stevens.)

Q. 16. What has been the position of Citra as identified with the fruit industry of Florida since the year 1894 or 1895?

A. By the freeze it lost a great deal of its prestige.

Q. 17. Well, since 1894, the fruit industry of Citra or of Marion County has been comparatively small? A. I don't know.

Q. 18. In answer to one of the previous questions, you stated that during your vacations between the years 1880 and 1894 you occupied your time in the building of sizers or machines for the sizing of oranges, and I will ask you to explain the construction of said machines. [43]

A. It was composed of two parallel troughs having one adjustable side on each trough. This adjustment adapted to each separate size of fruit so that the size could be changed or varied as needed.

Counsel for the complainant moves to strike the foregoing answer upon the grounds that the same does not relate to the issues in this case, and that the same is immaterial.

Q. 18. Mr. Stevens, I hand you a printed copy of United States letters patent number 247,428 granted H. B. Stevens, of Citra, Florida, under date of September 20th, 1881, for an "Apparatus for Sizing Oranges and Other Fruits." I will ask you to examine the same and state whether or not you are the patentee of the invention covered by said letters patent. A. I am.

Q. 19. Please state whether or not the said letters

(Deposition of Howard B. Stevens.)

patent and the drawings thereof represent the machine or orange sizer which you manufactured and sold at Citra during the period of time previously referred to in your testimony.

A. It does.

Q. 20. With the said letters patent before you, and referring more particularly to figures 1, 2, and 5 of the drawing contained in said letters patent, I will ask that you explain to the Court the manner in which you varied the discharge outlets of the fruit run-way to adjust the same to varying sizes of oranges to be sized by said machine.

A. Each unit for the separate sizes was opened or closed by means of adjusting bolts.

Q. 21. The adjusting bolts which you referred to constitute the members which appear in dotted lines on Fig. 5 of the drawings and which I have marked by the reference numeral A-5. Is that correct? A. That's correct. [44]

Q. 22. What recognition, if any, was given to your fruit sizer as disclosed by said letters patent number 247,428 by the packing-houses in this community?

A. Up to the time of the freeze there was but one packing-house that I knew of that used any other sizer.

Q. 23. Then, if I understand from your previous answer, your sizer dominated in this market?

A. It dominated in the State for a number of years.

Q. 24. Can you state approximately the output of oranges from Citra and Marion County, and by out-

(Deposition of Howard B. Stevens.)

put I mean the yearly output, between the years 1880 and 1894, or up to the time of the freeze which you have referred to?

A. I don't know if I can state for Marion County, but this locality of Citra, approximately, 300,000 crates per year.

Q. 25. And what proportion of these oranges were sized for the market by means of your device, the same being the sizer shown and described in your letters patent 247,428?

A. I say about ninety-eight per cent.

Q. 26. To what, Mr. Stevens, do you attribute the recognition given to your sizer during the years which you have testified?

Objected to by counsel for the complainant upon the ground that the same calls for the conclusion and opinion of witness, and further that it is irrelevant and immaterial. Question withdrawn from the witness.

Q. 27. Please explain what advantage, if any, was possessed by your sizer over such sizers as had been in the market in this section previous to the advent of your machine.

Objected to by counsel for the complainant upon the ground that the same calls for the conclusion and opinion of witness, and further that it is irrelevant and immaterial, and upon the further ground that witness is not qualified as an expert.

[45]

A. There were no sizers on the market previous to my machine. The only thing used for sizing fruit

(Deposition of Howard B. Stevens.)

was to pass the fruit through holes which could not be adjusted.

Q. 28. That is the sizers in use prior to the advent of your sizer were such as had nonadjustable outlets for the fruit, that is to say, the fruit dropped through or passed through an opening of appropriate size when reached? A. Yes.

Q. 29. What advantage to a sizer for oranges flowed by the introduction into a machine of independent and individual adjustment for each discharge outlet of the fruit run-ways of the sizer?

A. It made possible the varying of the pack and an economy in space of the bins.

Q. I offer in evidence printed copies of United States letters patent numbers 247,428 and ask that the same be marked by the notary Defendant's Exhibit Stevens' Patent 1881.

Said exhibit under stipulations to be withdrawn and substituted by a certified copy of said letters patent.

Q. 30. Are you acquainted with one M. A. Rice of Citra? A. Yes, sir; I am.

Q. 31. You will please state what length of time you have known Mr. Rice.

A. I have known him for a good many years. I couldn't say exactly how many.

Q. 32. Can you state whether you knew him prior to your removal from Citra to De Land?

A. Yes.

Q. 33. Did you ever have any business dealing with Mr. Rice with reference to the fruit sizer? [46]

A. Not that I remember.

(Deposition of Howard B. Stevens.)

Q. 34. Was Mr. Rice engaged in the orange industry of Citra? A. Not before I left Citra.

Q. 35. That is you have no recollection at this time of having had business dealings with Mr. Rice?

A. No.

Q. 36. Are you acquainted with one Edgar L. Wartmann of Citra, Florida, and if so, for what length of time have you been acquainted with him?

A. I have known him for about 40 years.

Q. 37. Mr. Wartmann engaged in the fruit industry of Citra?

A. He was in my employ for many years and Bishop Hoyt & Company grove.

Q. 38. Can you state whether or not Mr. Wartmann had any knowledge of the use of your sizer for oranges in this community during the years you have just testified to?

Counsel for complainant objects to the question upon the grounds that the same calls for the conclusion and opinion of witness.

A. He help set them up and help operate them.

Q. 39. Are you acquainted with one W. J. Crosby of Citra, Fla.? If so, what length of time have you known Mr. Crosby?

A. Well, a number of years, exactly how many I don't know. He used to be in my employ in the packing-house.

Q. 40. Was he in your employ in the packing-house prior to the year 1894? A. He was.

Q. 41. Did you sell your machine direct to the users thereof or was the same sold through agents?

A. At first to the direct users, later through E.

(Deposition of Howard B. Stevens.)

Bean of Jacksonville. [47]

Q. 42. Then as I understand it E. Bean of Jacksonville constituted your agent for the distribution of these machines. Can you state approximately the year in which you turned the agency over to E. Bean of Jacksonville? A. I think it was 1882.

Q. 43. Did your machine prove an efficient and practical apparatus for the sizing of fruit?

Counsel for complainant objects to the foregoing question upon the ground that it calls for the conclusion of witness.

Question is withdrawn.

Q. 44. What have you to say Mr. Stevens regarding the practicability and efficiency of your machine relative to the sizing of oranges?

Objected to upon the ground that the question calls for the conclusion of witness.

A. It sized accurately and perfectly.

Q. 45. Were your machines sold in large numbers to users of packing-house machinery prior to the year 1894? A. Yes; they were largely in use.

Q. 46. Can you state, Mr. Stevens, whether your machines were largely used in counties in the State of Florida, other than the county of Marion?

A. They were used in a number of other counties.

Q. 47. Please state, Mr. Stevens, whether your machine had a fruit run-way therein composed of two parallel members, one of said members being rigid, and the opposing member consisting of a series of end to end units each of said units being adjustable, toward and from the opposing fixed member of the fruit run-way.

(Deposition of Howard B. Stevens.)

Complainant's counsel objects to question upon the  
[48] ground that question is immaterial.

A. My machine was so constructed.

Q. 48. When you say your machine was so constructed, do you mean that all the machines manufactured and sold by you, as testified to, were so constructed? A. Yes, so constructed.

Q. 49. Can you state, Mr. Stevens, whether there is in existence at this time in any of the packing-houses located in Citra, or in Marion County, any of the machines which were sold by you or your agent prior to the year 1894?

A. I understand that M. A. Rice has some of those machines.

Q. 50. Mr. Stevens, I will hand you a series of photographic prints, four in number, and ask you to examine the same and state if you can what machine is disclosed thereby.

A. I should say that these are photographs of machines made by me.

Q. 51. That is machines of your patent?

A. Yes, and made under my direction.

Counsel for the defendant offers the photographs just identified by the witness, and ask that they be marked Photo Prints 1, 2, 3 and 4 for identification.

Q. 52. I notice in your letters patent you describe the fruit to be sized as being delivered to the fruit run-way by hand. Did any reason exist at the time of your invention why the fruit could not be delivered, and was not delivered, to the fruit run-way of the sizer by any suitable and well known form of conveyor or feed mechanism?

(Deposition of Howard B. Stevens.)

Counsel for complainant objects to question [49] upon ground that same is immaterial and not covered by the issues.

A. It was deemed necessary to very closely inspect and grade the fruit, and this sizer would size the fruit as fast as it could be graded and fed to the machine by hand. It could have sized faster had we known how to grade faster.

Q. 53. As I understand you, the grading was performed by hand? A. Yes, sir.

Q. 54. And due to this fact, the fruit was not fed to the sizer faster than the workmen could grade the fruit by hand?

Complainant's counsel objects to question upon ground that same is immaterial and not covered by the issues.

A. Yes.

Q. 55. If I understand you correctly, the grading of oranges and the sizing of oranges constitute different operations?

Complainant's counsel objects to question upon the ground that same is immaterial and not covered by the issues.

A. Yes.

Q. 56. What I wish to ask Mr. Stevens is this, whether the machine constructed under your patent is adapted solely for the work of sizing fruit, or does the machine size and grade. A. Solely for sizing.

Q. 57. I understood you in the forepart of your testimony to state that you had made some of these sizers since the year 1894. Am I correct in that understanding? A. Yes, and since 1900. [50]

(Deposition of Howard B. Stevens.)

Q. 58. Have you continued the manufacture or use of the machine since the year 1900?

A. I built for my own use only since 1900.

Q. 59. Up to what time?

A. Up to spring of 1914.

Q. 60. Where used? A. At DeLand, Florida.

Q. 61. But merely for your personal use as I understand? A. Yes.

Cross-examination waived.

HOWARD B. STEVENS. (Seal) [51]

Parties met pursuant to adjournment.

**Deposition of E. L. Wartmann, for Defendant.**

Mr. E. L. WARTMANN, a witness produced on behalf of the defendant, being first duly sworn, deposes and says as follows:

Q. 62. Please state your name, age, residence, and occupation.

A. Ed L. Wartmann; age, 58; Citra, Florida; orange grower and farmer.

Q. 63. How long have you resided in Citra, Fla.?

A. 40 years, last November.

Q. 64. From what time dates your identity with the orange-growing industry of the State?

A. Beginning November 1876 up to the present time.

Q. 65. Have you at any time been engaged in connection with any of the packing-houses for the packing and shipment of oranges of this place?

A. I think in the spring of 1878 I was employed by Howard B. Stevens then superintendent for Bishop

(Deposition of E. L. Wartmann.)

Hoyt & Co., and was in their employ for four years or more.

Q. 66. What was Mr. Stevens' position in said packing-house?

A. He was superintendent of the Bishop Hoyt property which I referred to.

Q. 67. Did your identity with the fruit industry of Citra cease with the termination of your employment with the Bishop Hoyt Company? A. No, sir.

Q. 68. After leaving the employ of said company, please explain what connection you had thereafter with the citrus industry of the State, and more particularly with the industry as carried on at Citra.

[52]

A. Since leaving the employ of Bishop Hoyt Company I have been a grower and shipper of citrus fruit up to the present moment.

Q. 69. As a shipper of oranges, did you pack the fruit for shipment yourself?

A. No, I had packers to do the work.

Q. 70. What I mean, Mr. Wartmann, if you had a packing-house for the packing of your fruit?

A. Yes, sir.

Q. 71. And where was the packing-house located?

A. Prior to the freeze of 1895 my packing-house was east of Citra about 2 miles.

Q. 72. Was the freeze which you have referred to in 1895 or in 1894?

A. The first cold came on December 27th, the morning of the 28th, 1894, which defoliated our trees, and another cold occurred in February following, which was 1895, destroyed them.

(Deposition of E. L. Wartmann.)

Q. 73. Prior to the freeze which you have just referred to, that is the freeze of 1894 or 1895, what position did Citra occupy relative to the fruit industry of the State of Florida?

A. We were known as the largest shipping point of citrus fruits in the world.

Q. 74. Can you state approximately, Mr. Wartmann, the yearly output of oranges which were packed and shipped at Citra, Florida, prior to the year 1894?

A. The crop of 1893 and 94 was given by the agents of the transportation lines 563,000 boxes, estimated about 1400 carloads. [53]

Q. 75. And how about the years prior to 1893 relative to the annual output?

A. Prior to 1893 I can't give you the number of boxes, but we considered them about fully as one-tenth of the fruit shipped in from the state.

Q. 76. What machinery, if any at all, was employed by you and the packing-houses generally in this section of Florida between the years 1881 and 1894 for the sizing of the oranges for shipment?

A. The sizer universally used by large growers in this section was the Stevens sizer.

Q. 77. Did you yourself operate any of the Stevens sizers? A. I have.

Q. 78. And prior to the year 1894?

A. I used Stevens sizer prior to 94.

Q. 79. And was said sizer used in your packing-house? A. It was.

Q. 80. You say that the Stevens sizer was generally used throughout this section, and more particularly

(Deposition of E. L. Wartmann.)

used by the large packers of fruit prior to the year 1894? Can you instance any of the packing-houses other than your own which employed the Stevens sizer for the sizing of the fruit?

A. My recollection is that fully ninety-five per cent of the fruit shipped from here was sized with the Stevens sizer. I think that the Crescent Orange Grove Company, Mr. John O. Matthews, Church Sangster and Chipman, William R. Hillyer, The James A. Harris Packing-house, Bishop Hoyt & Company, used six of them. Had six in operation in 93. I mean that the Bishop Hoyt people had six.

Q. 81. Are you the owner of a packing-house and are packing and shipping oranges?

A. I do. [54]

Q. 82. Other than your own packing-houses, can you state any packing-house wherein the Stevens sizer is located at this time?

A. I do not know of any machines that are in operation, but I understand that Mr. Rice has some in operation. I have charge of property at Orange Bend in Lake County, belonging to some New York people that have two of the Stevens sizers in it at the present time.

Q. 82. Mr. Wartmann, I will ask you to examine letters patent No. 247,428, which has been introduced in evidence in this case, the same being letters patent granted to H. B. Stevens under date of September 20th, 1881. Ask you to examine the same, and state how the Stevens sizer concerning which you have testified to, compares with said device of the Stevens patent.

(Deposition of E. L. Wartmann.)

A. This is the Stevens sizer such as I have used, and unpacked, set up, and frequently adjusted.

Q. 83. You state that the same represents the Stevens machine which you referred to in your testimony, and which you had set up and adjusted. What did you mean by the expression adjusted as used in your last answer?

A. These machines were made, I understand, in Dayton, Ohio, and were shipped here knocked down, and crated. I mean by setting them up, putting the parts together with bolts and screws, and usually adjusting them with a gauge by means of thumb screws in order that fruit going down the run-way would drop in its proper place. I worked with Mr. Stevens and would unpack these machines when sold to other people during the time that I was with him.

Q. 84. And during what times were you with Mr. Stevens?

A. I was with Mr. Stevens in 1882. [55]

Q. 85. Do you know of your own knowledge whether Mr. Stevens sold these machines for use in Citra, Florida? A. I do.

Q. 86. And prior to this year 1894?

A. Yes, sir.

Q. 87. What has been the extent of the orange industry at Citra, Florida, since the freeze of 1894 and 95 relative to the industry as it existed prior to that time?

A. The freeze of 1895 destroyed (about) all the groves in this territory, and we never have recovered to the extent of rebuilding over 20 per cent of the original property prior to 1895, and I do not think

(Deposition of E. L. Wartmann.)

that there has been a year since the freeze that we have shipped ten per cent of the crop of '93 and '94.

Q. 88. You made mention of a number of packing-houses which were in existence prior to the year 1894, and stated that the Stevens sizer was used throughout those packing-houses. Have those packing-houses continued in business since the year 1895?

A. Some of them.

Q. 89. Will you state which ones were continued?

A. The Crescent Fruit Company, the J. O. Matthews house is now the Seminole, the Church Sangster & Chipman is the Citra Fruit Company. Both the Bishop Hoyt and J. A. Harris packing-houses are not in existence.

Q. 90. Mr. Wartmann, I will hand you a series of photographic prints, which have been marked for identification, and will ask that you will examine the same and state how they compare with the Stevens machine which you have in your possession at one of your packing-houses. [56]

A. These are certainly what I have always known as the Stevens sizer.

Q. 91. Do I understand you to identify these as correct photographic prints of the Stevens sizer which you have in your possession?

A. I identify those.

Counsel for the defendant now offers in evidence the said photographic prints and asks that the same be marked by the notary "Defendant's Photographic Prints Stevens Machine."

Counsel for defendant now offers to accompany counsel for complainant to the packing-house

(Deposition of E. L. Wartmann.)

wherein said machine is located in order that he may personally examine said machine if he so desired.

Counsel for complainant states that he does not care to examine the machine referred to.

Q. 92. Mr. Wartmann, will you describe the construction of the fruit runway of the Stevens machine which you have testified to as having been sold in this community by Mr. Stevens and used by yourself and others prior to the year 1890?

A. The first machine Mr. Stevens built consisted of two parallel runways beginning with an opening at the top that would take a small sized orange, gradually opening it at the lower end to take the large size. The first machine, that consisted of two parallel pieces as a runway built to get an idea of the machine. He afterwards put in the adjustable parts, and that's the machine that he had patented.

[57]

Counsel for the complainant moves to strike that part of the witness' answer relating to what he designated as first machine upon the ground that the same is not responsive to question, does not come within the issues of this case, and is immaterial.

Q. 93. Am I correct in my understanding of your testimony as embraced in your last answer that this so-called first machine had a runway formed by two members arranged divergently and was made by Mr. Stevens as a model from which to work out his subsequent idea?

Objected to by counsel for complainant upon the ground that the same seeks to go outside the issues in this case, and is immaterial.

(Deposition of E. L. Wartmann.)

Counsel for defendant would state that counsel for complainant labors under a misapprehension as to the purport of the question. The question is placed to the witness for the purpose of clarifying the records in order that there may be no confusion in the Court's mind as to the intent of the witness. The witness testified as to a so-called first machine, and in his answer qualified the expression by the statement that it was made for the purpose to get an idea of the machine subsequently placed on the market by Mr. Stevens.

A. The first machine referred to in my answer consisted of two pieces of 2x4 tacked together with legs to get an idea of a sizing machine.

Q. 24. Did Mr. Stevens ever place on the market a sizer like that which you have described as his first machine? A. No, sir. [58]

Q. 95. Eliminating from consideration this so-called first machine, I will ask you to describe the construction and operation of the fruit run-way of the Stevens sizer, which you have testified to as having been sold in this community by Mr. Stevens, and used by yourself, Mr. Stevens, and others, prior to the year 1890?

A. The machine as sold by Mr. Stevens and used by growers consisting of two run-ways or grooves beginning at the highest point to accept the smallest fruit, running on down to take the largest sizes. It is probably ten feet long with adjustable plates or jaws with thumb-screws to adjust the machine to take the proper size of the fruit, from the small size of 252 to a size 126, with the opening bottom taking

(Deposition of E. L. Wartmann.)  
all sizes larger.

Q. 96. That was the sizer provided with two fruit run-ways, or what is commonly termed in this art a double sizer. Is that correct?

A. That is a double sizer.

Q. 97. Well, as I understand from your testimony each run-way of the sizer was composed of two parallel members? A. Yes.

Q. 98. Was one of the members adjustable toward and from the opposing member? A. They were.

Q. 99. Can you state whether or not the adjustable members consisted of a series of end to end members? Each of said members being adjustable toward and from the fixed member of the run-way.

A. Each size was adjustable toward and from the opposing member.

Counsel for the defendant asks that the question be re-read to the witness for the purpose of ascertaining whether he can give a better answer thereto.

[59]

A. These sections were adjustable, are adjustable, by two thumb-screws. I mean by section pieces practically 14 inches long for each sized orange.

Q. 100. How many of those adjustable sections or units were embodied in the Stevens machine as placed on the market by him in this community?

A. Six sections.

Q. 101. And those six sections provided for six sizing units for the fruit run-way, the overflow from the run-way at the discharge end thereof constituting the 7th size of the fruit? A. Yes.

Q. 102. Now, if I understand you correctly, the

(Deposition of E. L. Wartmann.)

Stevens sizer provided for six sizes of the fruit being sized and the overflow made the seventh.

A. That's right.

Q. 103. What advantage, if any, flowed from the use of adjustable units or sizing sections for the run-ways in the Stevens sizer?

Counsel for the complainant objects to question as calling for conclusion of the witness, and not coming within the issues.

Q. It enabled us to size the fruit correctly so as to pack out properly.

Q. 104. Can you state whether or not the adjustable sections or units of the Stevens machine were independently and individually adjustable relative to each other with respect to the opposing members of the fruit run-ways?

A. They were independent of each other, one section was adjusted independently of the other. [60]

Q. 105. If I understand from your last answer, one section of the fruit run-way could be moved toward and from the opposing walls of the run-way to increase or decrease the carrier of the discharge opening of the run-way controlled thereby without affecting the position of any other section or unit of the fruit run-way?

A. That is correct. You could. To illustrate, if your size of 176 was running a little slack in pack you could adjust this section, opening it up by the thumb-screw making the run-way a little larger, and not affect the other section.

Q. 106. Now, from your use of the Stevens sizer, and from the practical operation thereof in connec-

(Deposition of E. L. Wartmann.)

tion with the work of sizing oranges, did you find this adjustability, that is, the individual and independent adjustability for the discharge apertures or openings of the run-way to be advantageous for a proper sizing of oranges?

Question objected to by counsel for complainant upon the ground that the question does not come within the issues raised by this case.

A. We considered it advantageous.

Q. 107. And you found it useful and a necessity, did you not?

A. We found it useful and very convenient.

Q. 108. Are you acquainted with one W. J. Crosby, of Citra, Florida, and, if so, for what length of time have you known him, and in what business is he engaged?

A. I know Mr. W. J. Crosby. Been acquainted with him about 25 years. He is an orange grower. Has been an orange grower during the period that I knew him.

Q. 109. When you say an orange grower, do you mean a packer and shipper?

A. Packer and shipper and grove owner. [61]

Q. 110. Can you state whether Mr. Crosby ever used in any of his packing-houses the Stevens sizer?

A. Yes, I know that he has used the sizer.

Q. 111. Can you say whether his use thereof was prior to the year 1900?

A. My recollection, I first became acquainted with Mr. Crosby, he was working with the Bishop packing-house either as a grader or packer where these

(Deposition of E. L. Wartmann.)

sizers were used, and that prior to 1895. I don't recollect just what year.

Direct examination closed. Cross-examination waived by counsel for the complainant.

EDGAR L. WARTMANN. (Seal) [62]

In order to save time and needless expense to both parties, it is hereby stipulated between counsel and admitted by attorney for complainant that if W. J. Crosby, M. A. Rice, R. C. Douglas, J. C. Greiner, A. S. Kells, H. M. Eichelberger, A. S. Lambert, and J. W. Hagins were called to the stand for testimony in the present case and testified on behalf of the defendant, the said parties and each of them would testify that Howard B. Stevens, one of the witnesses on behalf of the defendant, had manufactured and sold in Citra, County of Marion, State of Florida, orange sizing machines made in accordance with letters patent 247,428 of September 20, 1881, Defendant's Exhibit Stevens Patent, and in conformity to the sizer disclosed by the photographic prints introduced in evidence on behalf of the defendant to the above action, and would have testified that the said machines had been used by them in their respective packing-houses and in other packing-houses in the County of Marion, State of Florida, and that said machines were manufactured and sold, and placed into use by the said Howard B. Stevens prior to the year 1894, and were used at Citra, and other places in Marion County, State of Florida, prior to said

time, and subsequent thereto and prior to the year 1900.

Citra, Fla., March 21, 1916.

FREDERICK S. LYON, (Seal)

By L. N. BALDWIN, (Seal)

Solicitor for Complainant.

N. A. ACKER, (Seal)

Solicitor for Defendant. [63]

**Certificate of Notary to Depositions Taken at Citra,  
Florida, March 21, 1916.**

State of Florida,

County of Marion.

I, K. Wartmann, Notary Public, in and for the County of Marion, State of Florida, do hereby certify that the foregoing depositions of Howard B. Stevens and Ed L. Wartmann were taken on behalf of the defendant in the above-entitled cause in pursuance to notice which is hereto attached, before me at my office in Citra, Florida, on the 21st day of March, 1916.

I further certify that on said days I was attended by N. A. Acker, Esq., representing the defendant and L. W. Baldwin, Esq., representing the plaintiff, and by the above-named witnesses, who were of sound mind and lawful age, and by me first carefully examined and cautioned and sworn before the commencement of their testimony, to testify the truth, the whole truth, and nothing but the truth; and the depositions were taken on the typewriter by Miss L. L. Brumby, for me in my presence and in the presence of the witnesses, and after carefully reading the same they were subscribed to by them

before me. I further *certify* that the reason for taking said depositions was and is the fact that the deponents live more than one hundred miles from the place where the said suit is appointed by law to be tried. That said testimony was begun on the 21st day of March, 1916, and finished on the 21st day of March, 1916. [64]

And I do further certify that I am not attorney nor of counsel for either of the parties in the said deposition and caption named, nor related to either by blood or marriage, nor in any way interested in the event of the cause.

In Testimony Whereof I have hereunto set my hand and seal this 21st day of March, 1916.

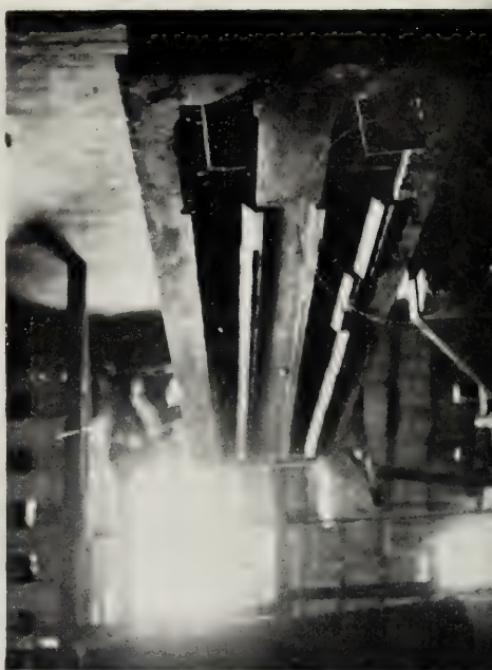
[Seal] R. K. WARTMANN, (Seal)

Notary Public.

My commission does not expire until July 9th, 1917. [65]

[THOSE PORTIONS OF THIS DEPOSITION WHICH ARE DUPLICATED IN DEFENDANT'S EXHIBIT NO. 3 ARE OMITTED HEREFROM.]

[Endorsed]: Def. Exhibit Stevens Patent of Sep. 20/81. R. K. Wartman, Notary Public. [66]



[Endorsed]: Defts. Ex. Photographic Prints  
Stevens Machine, R. K. Wartmann, Notary Public.  
(Seal) End view of sizer and bins.

[Endorsed]: Defts. Ex. Photographic Prints  
Stevens Machine, R. K. Wartmann, Notary Public.  
(Seal) This shows thumb nuts under top part of  
frame that holds the individual sizing units. One  
orange box is under one of the sizer units.

[Endorsed]: Defts. Ex. Photographic Prints  
Stevens Machine. R. K. Wartmann, Notary Public.  
(Seal) View of sizer with six individual sizing  
units.

[Endorsed]: Defts. Ex. Photographic Prints  
Stevens Machine. R. K. Wartmann, Notary Public.  
(Seal) This shows one of the individual units  
pushed in to make grade smaller.

**Letter, Citra, Florida, March 22, 1916, R. K.  
Wartman to William M. Van Dyke.**

Citra, Florida, March 22d, 1916.

Hon. William M. Van Dyke,  
Clerk, U. S. District Court,  
Los Angeles, Cal.

Dear Sir:

I did not have suitable fasteners with which to attach the covers to enclosed documents, and will ask if you will not kindly see that they are properly fastened, and oblige.

Yours truly,

R. K. WARTMAN,

Notary Public. [68]

Testimony. Equity-Suit A-44, A-45, A-50. N. D., N. A. Acker, Defendant's Atty. From R. K. Wartman, Notary Public, Citra, Florida. Val. \$50.00. Hon. William M. Van Dyke, Clerk U. S. District Court, Los Angeles, California. Express Charges Paid. U-9. Southern Express Company, Incorporated, from Citra, Fla. No. —. Tally No. —. Route No. —. Express Charges on this shipment are PREPAID. If express charges appear as collect on delivery sheet, deliver free, entering all numbers shown hereon and on the waybill-label, opposite the entry on delivery sheet. Value \$—. Weight —. Express Charges Prepaid. \$—, —, on — pieces. Filed Mar. 28, 1916. Wm. M. Van Dyke, Cl. By R. S. Zimmerman, Deputy Clerk. [69]

*In the United States District Court, Southern  
District of California, Northern Division.*

EQUITY SUIT—No. A-45.

FRED STEBLER,

Plaintiff,

vs.

MID-CALIFORNIA CITRUS ASSOCIATION,

Defendant.

**Notice of Taking Testimony.**

To Fred Stebler and Frederick S. Lyon, Esq., His  
Solicitor, Merchants Trust Building, Los An-  
geles, California:

Gentlemen:

Please take notice that the defendant herein will  
take the testimony of H. A. Beekhuis and J. E. Hans-  
ford, who reside respectively at 411 E. 10th Street  
and 402 E. 9th Street, in the City of Hanford, County  
of Kings, State of California, and of A. Nieson, who  
resides at Armona, in the county of Kings, State of  
California, and probably others, for use on behalf of  
defendant at the trial of the above-entitled cause, be-  
fore Ed. T. Smith, a notary public, in and for the  
County of Kings, State of California (or some other  
official authorized by law to take depositions), and  
not of counsel or attorney to either of the parties, nor  
interested in the event of this cause, at the office of  
said [70] Ed. T. Smith, in the Hills Building,  
West Eighth Street, Hanford, California, on Thurs-  
day, the 6th day of July, 1916, commencing at 10:30  
o'clock in the forenoon; all of said witnesses resid-  
ing more than one hundred miles from the place of

trial herein and more than one hundred miles from any place at which a district Court of the United States for the Southern District of California, is appointed to be held by law.

Such testimony will be given in accordance with the provisions of Sections 863, 864, 865 of the Revised Statutes of the United States. Adjournment will be taken from day to day and at such time and place as may be necessary for the taking of the depositions without further notice.

You are invited to attend and cross-examine.

Very respectfully,

N. A. ACKER,

Solicitor and of Counsel for Defendant.

San Francisco, California, June 27, 1916.

[Endorsed]: No. A-45. U. S. District Court, Southern District of California. Fred Stebler, Plaintiff, vs. Mid-California Citrus Association, Defendant. Notice of Taking Testimony. Service of the within notice admitted this 1st day of July, A. D. 1916. Frederick S. Lyon, Solr. for Plaintiff. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for \_\_\_\_\_.  
[71]

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*In the United States District Court, Southern  
District of California, Northern Division.*

EQUITY SUIT No. A-44.

FRED STEBLER,

Plaintiff,

vs.

PORTEVILLE CITRUS ASSOCIATION,  
Defendant.

**Notice of Taking Testimony.**

To Fred Stebler, and Frederick S. Lyon, Esq., His  
Solicitor, Merchants Trust Building, Los An-  
geles, California.

Gentlemen:

Please take notice that the defendant therein will take the testimony of H. A. Beekhuis and J. E. Hansford, who reside respectively at 411 E. 10th Street and 402 E. 9th Street, in the city of Hanford, county of Kings, State of California, and of A. Nieson, who resides at Armona, in the county of Kings, State of California, and probably others, for use on behalf of defendant at the trial of the above-entitled cause, before Ed. T. Smith, a Notary Public, in and for the county of Kings, State of California (or some other official authorized by law to take depositions), and not of counsel or attorney [72] to either of the parties, nor interested in the event of this cause, at the office of said Ed. T. Smith, in the Hills Building, West Eighth Street, Hanford, California, on Thursday, the 6th day of July, 1916, commencing at 10:30 o'clock in the forenoon; all of said witnesses residing more than one hundred miles from the place of trial herein and more than 100 miles from any place at which a District Court of the United States for the Southern District of California, is appointed to be held by law.

Such testimony will be given in accordance with the provisions of Sections 863, 864, 865 of the Revised Statutes of the United States. Adjournment will be taken from day to day and at such time and place as may be necessary for the taking of the depo-

sitions without further notice.

You are invited to attend and cross-examine.

Very respectfully,

N. A. ACKER,

Solicitor and of Counsel for Defendant.

San Francisco, California, June 27, 1916.

[Endorsed]: No. A-44. U. S. District Court, Southern District of California. Fred Stebler, Plaintiff, vs. Porterville Citrus Association, Defendants. Notice of Taking Testimony. Service of the within notice admitted this 1st day of July, A. D. 1916. Frederick S. Lyon, Solicitor for Plaintiff. Nicholas A. Acker, Attorney at Law, Foxcroft Building, 68 Post Street, San Francisco, Cal., for ———.

[73]

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*In the United States District Court, Southern  
District of California, Northern Division.*

EQUITY SUIT No. A-44.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

**Depositions Taken at Hanford, California.**

BE IT REMEMBERED that pursuant to the annexed copy of taking of testimony at the office of Ed. T. Smith, the notary public named in the said notice of taking testimony, and adjourned to the Superior Courtroom, in the courthouse, in Hanford, in the county of Kings, State of California, present on behalf of complainant, Frederick S. Lyon, Esq., pre-

sent on behalf of defendant, Nicholas A. Acker, Esq., the following proceedings were had, to wit:

Mr. ACKER.—It is hereby stipulated that the testimony herein may be taken down stenographically by Walter Moore, under the directions of Ed. T. Smith, the notary public named in the notice of taking testimony.

It is further stipulated that the testimony given herein may be read into companion case Number A-45, entitled, "Fred Stebler, Plaintiff, vs. Mid-California Citrus Association, Defendant," with the same force and effect as though taken as original testimony in the said case.

It is further stipulated that printed uncertified copies of United States letters patent may be introduced in evidence, and used with the same force and effect as though duly certified. [74]

Mr. LYON.—And that the recitals as to the filing dates of the respective applications therefor that may be contained in said printed copies of patents may be received as *prima facie* evidence of such filing dates, all subject to correction by the production of duly certified copies of such patents or applications, if any errors are found in such printed copies.

At this time Walter Moore was sworn to act as stenographic reporter in the taking of said testimony.

**Deposition of H. A. Beekhuis, for Defendant.**

H. A. BEEKHUIS, a witness produced on behalf of the defendant, being first duly sworn, testified as follows, to wit:

Direct Examination by Mr. ACKER.

Mr. ACKER.—Q. Mr. Beekhuis, will you please

(Deposition of H. A. Beekhuis.)

state your name, age, residence, and occupation?

A. H. A. Beekhuis; age, forty-six; residence, four hundred and eleven East Tenth Street, Hanford, Kings County; manager of North Ontario Packing Company.

Q. What is the business conducted by the said Company? A. Dried fruit.

Q. How long have you been associated with or interested in the fruit industry in this state?

A. Since eighteen hundred and ninety four; that is, twenty-two years.

Q. What connection, if any at all, have you had relative to machinery for the sizing or grading of fruit?

A. Well, I have had experience along those lines right from the beginning in the fruit business; in connection with the dried fruit industry I have had experience with fruit graders; fruit graders are used in practically all branches of the fruit industry that I was connected with; at one time I myself invented a fruit grader.

Q. You say at one time you invented a fruit grader; did you receive [75] a patent or make application for patent for the said fruit grader?

A. Yes, sir; I applied for a patent in February, nineteen hundred and eight for a fruit grader; that patent was issued, I believe, some six months later.

Q. Have you a copy of the letters patent?

A. Yes, sir.

Q. You have just handed me printed copy of United States letters patent number nine hundred

(Deposition of H. A. Beekhuis.)

and six thousand, six hundred and five, granted to H. A. Beekhuis, December fifteenth, nineteen hundred and eight; fruit grader; I understand you are the H. A. Beekhuis, the patentee of the said device.

A. Yes, sir.

Q. What disposition, if any at all, did you make of the invention set forth in the said letters patent, Mr. Beekhuis?

A. I assigned the interest to the California Fruit Canners Association.

Q. Please state whether or not an apparatus was ever manufactured or constructed under that letters patent which you have just handed me.

Mr. LYON.—That's objected to as leading and incompetent; calling for the conclusion and expression of opinion of the witness; not the best evidence; incompetent; no foundation laid for the introduction of secondary evidence.

Mr. ACKER.—Question is withdrawn.

Q. From what were the drawings made which are attached to and made a part of the letters patent?

A. The drawings were made from a model and the model in turn was made from the machine that was in operation at the local cannery of the California Canners Association.

Q. Was that machine in operation in one of the houses here?

A. Yes, the previous season—canning season, the machine was in operation; then after the season closed I had a model made of the [76] machine and took that model to the attorney, Mr. Booth, and

(Deposition of H. A. Beekhuis.)

Mr. Booth had the drawings made from that model.

Mr. ACKER.—I will introduce or offer in evidence the letters patent referred to by the witness, and ask that the notary public mark it as defendant's exhibit, Beekhuis patent, number nine O six, six O five.

Mr. LYON.—It is objected to as incompetent, irrelevant and immaterial; not a part of the prior art, the said letters patent having been granted and issued subsequently to the filing of the application for the patent in suit by complainant Fred Stebler.

Mr. ACKER.—You stated in one of your previous answers, Mr. Beekhuis, that the apparatus from which the model was made for presentation to your attorney for the filing of the application which eventuated in the grant of the letters patent number nine O six, six O five, was in use in one of the packing-houses; please state when that apparatus was constructed and when the same was installed and placed in operation.

A. The original grader was installed in the early spring of nineteen hundred and six, and it was operated during the season of that year; then during the fall of nineteen hundred and six, or possibly the early spring of nineteen hundred and seven, an improvement was made in the machine, and in that way it was operated during the season of nineteen hundred and seven, and the application for the patent described the machine as it was in operation during that year.

Q. In nineteen hundred and seven.

A. In nineteen hundred and seven.

(Deposition of H. A. Beekhuis.)

Mr. LYON.—We object to the last portion of the answer, including and following the words, "the application for patent," on the ground the same is not responsive to the question; and as incompetent; not the best evidence; no foundation laid for the introduction [77] of secondary evidence; move to exclude the same from consideration, and strike the same from the record upon that ground.

Mr. ACKER.—Q. When and where was the machine installed in nineteen hundred and seven, and during what portion of the year nineteen hundred and seven?

A. The machine was installed at the local plant of the California Fruit Canners Association, either during the latter part of nineteen hundred and six, or the early part of nineteen hundred and seven.

Q. What is your best recollection?

A. My best recollection is it was the early part of nineteen hundred and seven; February or March; somewhere around that time.

Q. Is that machine in use at the present time?

A. Yes, sir.

Q. Has it been in continuous use since its installation?

Mr. LYON.—Objected to as leading.

A. Yes, sir.

Mr. ACKER.—I will hand you a photograph and ask you to examine the same, and state whether or not you can identify the said photograph.

A. Yes, sir; that photograph was taken—

Mr. LYON.—Just a moment; object to the witness

(Deposition of H. A. Beekhuis.)

stating what the photograph is; he has answered the question.

Mr. ACKER.—Q. You identify that photograph?

A. Yes, sir.

Q. Please state what that photograph was and what it is a photograph of.

Mr. LYON.—That is objected to as incompetent; not the best evidence; no foundation laid for the introduction of secondary evidence.

A. The photograph was taken of the grader as it stands at the present time in the plant of the California Fruit Canners Association; at Hanford.

Mr. ACKER.—Q. Is that the machine which you referred to in your [78] previous answer as to which a model was made for the purpose of presentation to your attorney for the filing of application for letters patent? A. Yes, sir.

Mr. LYON.—Objected to as leading.

Mr. ACKER.—Q. You are the owner of the machine which is represented by the photograph you now hold in your hand? A. No, sir.

Q. The California Fruit Canners Association I understand to be the owner of that machine?

A. Yes, sir; the owner of the machine.

Q. What is the approximate size and weight of that machine, Mr. Beekhuis?

A. The size is approximately thirty-five feet long; that is, of the main grader; the main grader is about thirty or thirty-five feet long; the belts would increase it about fifteen or sixteen feet; the width is approximately eight feet; the weight I have no idea

(Deposition of H. A. Beekhuis.)  
of; what the weight would be.

Q. Please describe the operation of the said machine, Mr. Beekhuis.

Mr. LYON.—That is objected to as incompetent; no foundation laid; not the best evidence.

Mr. ACKER.—As installed in the packing-house which you have referred to and at present in use in the said packing-house.

Mr. LYON.—Of course we object to the amendment of the question.

A. The fruit is put in one end of the machine so that it comes on top of the grading-table; then through a shaking motion imparted to the grading-table it is moved forward over that table, and from the fact that this table is provided with holes increasing in size, the small fruit is shaken out first, and the larger size later on as it travels on over the grading-table; then when it drops down it lands on a system of distributing belts that connect with the canning tables where they are put in the cans; where the fruit is put in the cans; the distributing belts are arranged in [79] such a way that the fruit can be moved either from the grading-tables to either belt, or from one belt to the other.

Mr. ACKER.—Q. Referring to your letters patent number nine O six, six O five, I direct your attention to the part marked by the reference numeral eight, and ask you to state what is the function of the said part.

Mr. LYON.—That is objected to as incompetent, and not the best evidence; said letters patent speak

(Deposition of H. A. Beekhuis.)  
for themselves.

A. Number eight is the main carrier connecting with the canning tables.

Mr. ACKER.—Q. Please mark on the photograph which you referred to in your previous answer by the letter "A" the part designated thereby which corresponds to the part marked eight in the said letters patent.

Mr. LYON.—The question is objected to as calling for the conclusion, and as leading; assuming a fact not in the testimony of the witness.

(Witness marks.)

Mr. ACKER.—Q. Please mark on the said photograph by a reference letter "B" a part therein which corresponds or conforms to the part in the drawing of the said letters patent designated by the reference numeral eleven.

Mr. LYON.—Same objection as last noted on the record.

A. They don't show on the photograph; those marks by the cipher eleven are swinging gates; which in the photograph are closed; lets see; there is one partly open; yes, one is partly open.

Mr. ACKER.—Q. Please mark it by the reference letter "B."

Mr. LYON.—Same objection.

A. (Witness marks.)

Mr. ACKER.—Q. When the fruit left the shaking-table of the said machine as installed by you in the packing-house mentioned, where did the graded or sized fruit go to?

(Deposition of H. A. Beekhuis.)

A. It drops on to a slanting [80] shute.

Q. Does the said shute appear in the photograph, and if so, mark it by the reference letter "C"?

A. (Witness marks.)

Q. And from the shute "C" where did the fruit go?

A. The fruit—from "C" it will drop on the main carrier "A."

Q. And from the main carrier "A" where did the fruit go?

A. From the main carrier "A" it will go through gates marked "B" on to the belts of the canning tables.

Q. Do the belts leading to the tables which you refer to in your last answer appear on the said photograph? A. No, sir.

Q. Do they appear on the said—why is it they do not appear on the photograph?

A. Well, because they are—the structure of the canning table prevents a view of them; I can give you an idea where they are, but they don't show.

Q. What reference numeral designates those belts which you say are hidden by the canning-tables on the drawing of your patent number nine O six, six O five?

Mr. LYON.—That's objected to as leading and suggestive; not the best evidence; calling for the conclusion of the witness; incompetent; no foundation laid for the introduction of secondary evidence.

A. Number twelve.

Mr. ACKER.—Q. In the machine as installed by

(Deposition of H. A. Beekhuis.)

you, and as represented by the photograph which you have referred to, how many grades or sizes of fruit are divided by it? A. Six grades.

Q. How many shutes are provided for in the machine relative to the size or grade apparatus of the grade element?

Mr. LYON.—That is objected to as leading; and suggestive; and assuming a fact that the witness has not testified to.

A. Five shutes; the sixth grade is a grade that goes over the grader that is too large to fall through any of the apertures, [81] and that is provided with a separate chute; different from the other shutes; laying underneath the grading-table.

Mr. ACKER.—Q. Under whose supervision, Mr. Beekhuis, was this photograph that you have presented here made? A. Under my supervision.

Q. And when was the same made?

A. July the fifth, nineteen hundred and sixteen.

Q. When did you last see the machine in operation, Mr. Beekhuis?

A. Nineteen hundred and seven.

Q. I say when did you last see it?

A. That's the last time I saw it in operation; during the season of nineteen hundred and seven.

Q. Was it in operation at the time this photograph was made?

Mr. LYON.—Objected to as leading.

A. It was not in operation because the season was not open yet for the canning of peaches.

Mr. ACKER.—Q. What was your position in the

(Deposition of H. A. Beekhuis.)

canning-house in which this machine was installed?

A. Superintendent.

Q. And for what length of time were you superintendent of the said house?

A. From nineteen hundred and three—April, nineteen hundred and three, until March the first, nineteen hundred and eight.

Q. Did you sever your connection with the house at that time? A. At that time, yes.

Mr. ACKER.—I will introduce the photograph in evidence and ask that the same be marked defendant's exhibit, photograph, Beekhuis machine.

Mr. LYON.—Objected to as incompetent; no foundation laid.

Mr. ACKER.—Q. Please state what success followed the operation of the said machine, Mr. Beekhuis.

A. It was a complete success in regard to the functions that were expected of it; that is, separating the fruit in accordance to its size and distributing [82] it to the various canning-tables.

Q. By whom was the machine built, Mr. Beekhuis, which was installed in the packing-house to which you have referred, and as installed not later than March, nineteen hundred and seven?

A. Does that refer to the improvement that was made during the season of nineteen hundred and six and the early spring of nineteen hundred and seven?

Q. I mean nineteen hundred and seven; by whom was that machine built?

(Deposition of H. A. Beekhuis.)

A. That was built by A. Nieson.

Q. And was Mr. Nieson connected with the packing-house?

A. He was the engineer of the packing-house; of the cannery.

Q. Is he connected with that packing-house at the present time?

A. He is at the present time foreman of the Kings County Packing Company at Armona.

Mr. ACKER.—You may take the witness, Mr. Lyon.

Cross-examination by Mr. LYON.

Mr. LYON.—Q. What kind of fruit was this grader used with while you were connected with that packing-house, Mr. Beekhuis?

A. With peaches; used for peaches.

Q. Had those peaches been dried before being run through this machine? A. No, fresh peaches.

Q. Were they in their natural form or had they been cut? A. They had been cut.

Q. Cut in halves. A. Cut in halves.

Q. Have you had any experience with the separation of oranges in accordance to their size?

A. No, sir.

Q. You don't know then whether a grader such as this one which you have referred to would be a successful operative in separating oranges according to their size, do you? [83]

A. I would imagine it would be; it would operate successfully in dried fruit and on anything, I would imagine, that would require separation according to size.

(Deposition of H. A. Beekhuis.)

Q. Would it have any capacity as a separator of oranges as to size?

A. Well, I would imagine it would have as large a capacity there as anything else that would run over it.

Q. You have no knowledge from any experience as to whether or not that would be a fact or not, have you?

A. No; in my mind I compare it with the capacity that the dried fruit grader would have and built of the same dimensions and that would be the same capacity practically as it would have on fresh fruit.

Q. You say that these belts which were arranged at right angles to the length of the grader, and which you say do not appear in this photograph, led to the packing-tables; please explain to us what you meant by packing-tables.

A. Packing-tables or canning-tables are the tables on which the fruit is canned; they consist of a belt that carries the fruit from the grader alongside of the canning-table; then it is provided with bins in which the fruit drops from the belt; each bin is provided with a swinging gate that each packer can fill the bin with the required amount and then close the gate and let the fruit pass on; the tops of the canning-table are provided with screens to place the trays we can when filled with fruit, and also with racks to carry the empty cans.

Q. None of that apparatus shows in this photograph?

A. Not in detail; the general appearance of the

(Deposition of H. A. Beekhuis.)  
canning-table shows in the photograph.

Mr. LYON.—That's all.

Mr. ACKER.—I would like to be permitted to ask a question on [84] direct examination.

Mr. LYON.—Go ahead and ask it.

Mr. ACKER.—Q. Mr. Beekhuis, have you the model of the device which you submitted to your attorney for the letters patent on the device?

A. No, sir.

Mr. ACKER.—If counsel for complainant so desires we will adjourn the taking of further testimony at this point so as to enable him to visit the packing-house and inspect the machine as installed therein and from which the photograph was taken, it being impossible to secure the machine itself and produce it in court.

Mr. LYON.—I will avail myself of the opportunity to inspect the alleged machine, but do not require an adjournment for that purpose at this time, as the witness in the case, if I should desire to further cross-examine, can be readily recalled.

Mr. LYON.—It is stipulated and agreed that the reading over and signing of these depositions by the witnesses is waived, and that the depositions as certified by the notary public and returned to the court, may be read in evidence with the same force and effect as though read over and signed in the presence of counsel and the notary public, and subject to all objections which would otherwise be good as to the depositions if duly signed.

**Deposition of J. E. Hansford, for Defendant.**

J. E. HANSFORD, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows, to wit:

Direct Examination by Mr. ACKER.

Mr. ACKER.—Q. Mr. Hansford, please state your name, age, residence and occupation.

A. J. E. Hansford; four hundred and two East Ninth Street, Hanford, Kings County, California; laborer.

Q. Where are you employed at the present time, Mr. Hansford? [85] A. Rosenberg Brothers.

Q. And what is the business of the Rosenberg Brothers? A. Dried fruit.

Q. How long have you been identified with that line of business? A. Sixteen years.

Q. Where were you employed prior to taking employment with the company with which you are now employed?

A. California Fruit Canners Association.

Q. When were you in their employ?

A. Nineteen hundred and six to nineteen hundred and twelve.

Q. Nineteen hundred and six to nineteen hundred and twelve. A. Yes, sir.

Q. Are you acquainted with one Hermanus A. Beekhuis? A. Yes, sir.

Q. How long have you known Mr. Beekhuis?

A. Since nineteen hundred and four.

Q. Have you ever been employed with the same companies with Mr. Beekhuis? A. Yes, sir.

Q. Which company?

(Deposition of J. E. Hansford.)

A. California Fruit Canners Association.

Q. What machinery is used in the California Fruit Canners Association's plant during the term of the employment, if any at all, for the grading or sizing of fruit?

A. Well, it is a big grader that Mr. Beekhuis constructed.

Q. Can you state when the machinery was there that Mr. Beekhuis constructed or when it was installed?

A. It was installed in nineteen hundred and six.

Q. What portion of the year nineteen hundred and six?

A. It was ready for the beginning of the season; I suppose we commenced about July.

Q. And what length of time was it in use in the said packing-house of the California Fruit Canners Association? [86] A. It is in use there yet.

Q. Of your own knowledge?

A. Well, I was in there about two months ago and it was there; I saw the machine there.

Q. Was it in use—can you state whether it was in use in the packing-house of the California Fruit Canners Association during the years which you were employed there from nineteen hundred and six to nineteen hundred and twelve?

A. Yes, sir; it was continuously used every year.

Q. Please describe the machinery which you have referred to as having been installed during the latter portion of nineteen hundred and six and in use in the said packing-house up to the time you sev-

(Deposition of J. E. Hansford.)

ered your connection with the same.

A. Well, it is a big long frame built on the style of any dried fruit grader, but the styles are different; the screens are different; smaller first and a little larger and larger and so on.

Q. What became of the fruit after it left the screens?

A. It dropped on to a belt, and that belt transfers it to different cross belts out into the canning-room.

Q. I hand you a photograph which has been introduced in evidence in this case, and ask you to examine the same, and state if you can identify the machine portrayed thereby?

A. Yes, sir; this is the machine here; grading part; the fruit comes out on to the belt here and runs off to these different canning-tables here.

Q. You say runs on to the belts here; meaning the belt which has been—

A. There is a long cross-belt along here.

Q. Marked by the reference letter "A"?

A. This belt is "B."

Q. And what transfers it from the Belt "B" to the canning-tables?

A. From "B" to the canning-tables?

Q. Yes, sir.

A. It first went on to another belt and then [87] off of that belt to a belt running this way; to transfer it from the first belt to the second there was a big tin flap went down; slid it to the second belt.

Q. Then as I understand it there were—it went from the second belt to those transfer belts?

(Deposition of J. E. Hansford.)

A. Yes, sir.

Q. And where did these transfer belts take the fruit?

A. Along in different bins to the ladies that canned the fruit.

Q. Do I understand that that is the machine which Mr. Beekhuis installed for the California Fruit Canners Association?

A. Yes, sir, this is the machine.

Q. For what packing-house of the California Fruit Canners Association was the machine represented by the said photograph installed by Mr. Beekhuis?

A. Well, it is the packing-house in Hanford; I think the number is seventeen; I wouldn't be positive.

Q. It is the Hanford packing-house.

A. Hanford packing-house.

Q. Can you tell what success, if any at all, was had with the operation of the said machine?

A. Yes, sir; it was very successful according to our estimation; for grading fruit and labor saving.

Q. Do you know by whom the machine was built or constructed?

A. Well, Mr. Beekhuis was the superintendent of it, but I think Frank Smith first built the machine; him and a fellow named Nieson; I think they both worked on it.

Q. And was Mr. Nieson in the employ of the California Fruit Canners Association? A. Yes, sir.

Q. What was his position?

(Deposition of J. E. Hansford.)

A. He was engineer I think at that time.

Q. You made mention in one of your previous answers as to a tin flap; does that tin flap appear on the photograph exhibit?

A. Yes, sir; I think this is it. (Showing.)

Q. Will you mark it with the reference letter "D"? [88]

A. (Witness marks.)

Mr. ACKER.—You may take the witness.

Cross-examination by Mr. LYON.

Mr. LYON.—Q. Have there been any changes made in this machine while you were there?

A. Yes, sir, I think there was.

Mr. LYON.—That's all.

Redirect Examination by Mr. ACKER.

Mr. ACKER.—Q. What was the nature of those changes, Mr. Hansford?

A. They added another belt to it in the year nineteen hundred and seven, I think it was.

Mr. ACKER.—That's all.

#### **Deposition of A. Nieson, for Defendant.**

A. NIESON, produced as a witness on behalf of the defendant, being first duly sworn, testified as follows, to wit:

Direct Examination by Mr. ACKER.

Mr. ACKER.—Q. Mr. Nieson, will you please state your name, age, residence and occupation?

A. Alvin E. Nieson; age, thirty-five; residence, Armona; occupation, foreman of cannery.

Q. What cannery are you foreman of?

(Deposition of A. Nieson.)

A. Kings County Packing Company at Armona.

Q. How long have you occupied the position of foreman of the said packing-house?

A. Two years.

Q. And where were you employed prior to that?

A. Anderson Baglsey Company, San Jose.

Q. Were you at any time employed by the California Fruit Canners Association? A. Yes, sir.

Q. During what years?

A. Nineteen hundred and six and nineteen [89] hundred and seven, and a portion of nineteen hundred and eight, I think, but I don't remember the exact time.

Q. What was your position in the packing-house at said time and what was the name of the packing-house?

A. I was engineer; engineer and repairman.

Q. And what packing-house was that?

A. California Fruit Canners Association.

Q. In the Hanford packing-house?

A. Yes; Hanford plant.

Q. Are you acquainted with H. A. Beekhuis?

A. Yes, sir.

Q. What length of time have you known him?

A. Well, since nineteen hundred and six.

Q. Was Mr. Beekhuis an employee of the California Fruit Canners Association in the Hanford packing-house at that time? A. Yes, sir.

Q. And what was his position in the Hanford packing-house? A. Manager.

Q. What machinery, if any at all, was employed in the Hanford packing-house of the California

(Deposition of A. Nieson.)

Fruit Canners Association during the said years for the grading or sizing of fruit, if any?

A. A grader; machinery for the sizing of fruit; grader was all that I remember of.

Q. What machine was that? Please describe it a little more in detail; by whom that machine was built, or whose machine it was.

A. The machine was designed by Mr. Beekhuis; in nineteen hundred and six.

Q. Did you have anything to do with the building of that machine?

A. No; I was there when it was built.

Q. Please state when it was built and whether or not the same was ever placed into use.

A. It was built in nineteen hundred and six; spring of nineteen hundred and six; and was placed in use in [90] nineteen hundred and six.

Q. What length of time was it maintained in use?

A. During the peach season; peach canning season.

Q. Of what year or years?

A. In nineteen hundred and six and seven.

Q. Was it in use during the term of your employment with the California Fruit Canners Association? A. Yes, sir.

Q. Do you know whether it is in use at the present time or not?

A. Well, it is in the factory; I presume they are using it as far as I know.

Q. I direct your attention to the drawings contained in letters patent exhibit offered in evidence on behalf of defendant number nine hundred and six

(Deposition of A. Nieson.)

thousand, six hundred and five, and ask you to examine the same, and state how the machine represented thereby conforms to the machine which you have testified about.

Mr. LYON.—That's objected to as incompetent; not the best evidence; no foundation laid for the introduction of secondary evidence; leading and suggestive.

A. Now, what do you want me to do?

Mr. ACKER.—Q. I don't want you to do anything; my question is, how does the machine which you have testified to as having been installed for the packing-house conform to the machine represented by those drawings?

Mr. LYON.—Same objection as last noted on the record.

A. Well, the only difference is that this crank shaft the way the machine is is in the center and the shaker is cut in two in the center; it has two belts the same as it shows here; that is, the—at the time that I left the company why the grader had two belts the same as it has now; but the grader has now three belts; one has been added since I left.

Mr. ACKER.—Q. I hand you a photograph which has been introduced [91] in evidence on behalf of the defendant and ask you to examine the same and state whether you can identify the machine represented thereby?

A. Yes, I can identify that as being the machine.

Q. As being what machine?

A. As being the grader that is now installed in the Hanford plant of the C. F. C. A.

(Deposition of A. Nieson.)

Q. That is, the grader that you have referred to in—  
A. Which I have referred to.

Mr. ACKER.—You may take the witness, Mr. Lyon.

Cross-examination by Mr. LYON.

Mr. LYON.—Q. Your attention, Mr. Nieson, has been directed to Defendant's Exhibit "B," patent number nine O six, six O five; I call your attention to the belt or conveyor or carrier twelve of that patent; these were conveyers for carrying the fruit away to the point where it was to be packed?

A. Yes; to the canning-tables; each one of these belts here that lead right this way represent a canning-table.

Q. Now, how many of those belts were there on that machine at the time that you left the said packing-house in nineteen hundred and eight?

A. Well, now, I don't remember exactly, but I think there was eight; to the best of my knowledge.

Q. They simply conveyed the fruit to the other portions of the house where ever the tables were located?

A. Well, now, this large belt here, number eight, it is a distributing belt; it was to force different grades of fruit off of the screens on to the canning-tables; now, if I remember right, there was six different sized screens here and six of these canning-tables; and this belt, number eight belt, took that fruit from each screen to each canning-table; then if there was other fruit than these tables would handle it would turn into number fourteen belt and taken down to [92] two extra tables on the end;

(Deposition of A. Nieson.)  
we called it a transfer belt.

Q. And the belt sixteen also then carried the fruit off to the other portions of the packing-house.

A. To the other portions of the packing-house.

Mr. LYON.—That's all.

Redirect Examination by Mr. ACKER.

Mr. ACKER.—Q. In one of your previous answers on cross-examination you said the fruit was taken from—distributed by belt eight to the canning-tables, and you referred to the drawing and the part marked twelve; do I understand the parts marked twelve are the canning-tables?

A. Are the canning-tables, yes, sir; these are canning-tables.

Q. Are they canning-tables or belts?

A. Well, the canning-tables have a belt on them, and I presume this represents the belt; the belt on the canning-table, but the canning-table butts right up against the chute here.

Q. I direct your attention to a part marked twelve; on the drawing; what was the purpose of that, if you know?

A. Well, I think that eleven represents the switch; these parts marked eleven are switches.

Q. And what do they do?

A. You can close this switch and let this fruit go down this belt on to the next table if you want to.

Q. And were those switches on the machine as installed by Mr. Beekhuis? A. Yes.

Mr. ACKER.—That's all.

Mr. LYON.—That's all.

At this time counsel, the witness H. A. Beekhuis

(Deposition of H. A. Beekhuis.)

and complainant Fred Stebler made a trip of inspection of the [93] machine installed by said Beekhuis for the California Fruit Canners Association at its packing-house in Hanford.

**Deposition of H. A. Beekhuis, for Defendant  
(Recalled).**

H. A. BEEKHUIS, recalled as a witness on behalf of the defendant, testified as follows, to wit:

Direct Examination by Mr. ACKER.

Mr. ACKER.—Q. Mr. Beekhuis, you have just accompanied counsel to the packing-house where this machine was installed; I will ask you to examine the photograph, defendant's exhibit, Beekhuis machine, and state whether since the examination you have any reason to vary or alter the testimony heretofore given by you. A. No, sir.

Q. I noticed in the examination of the machine that there were certain waters sprayed down on the shaking and grading screens; what was the purpose or the function of that water, and is the water-pipe illustrated in the said photograph exhibit?

A. That water-pipe is illustrated, yes; in the photograph; the function of it is to keep the fruit moist and therefore enable it to slip quicker through the holes than it would in case it became dry.

Q. Since your examination of the machine do you know of any reason why the said machine is not adapted for grading fruit other than sliced peaches?

A. No, sir.

Mr. ACKER.—That's all.

Mr. LYON.—That's all; no cross-examination.  
[94]

I, Walter Moore, do hereby certify that I am the Official Phonographic Reporter of the Superior Court of the County of Kings, State of California; that on the 6th day of July, 1916, I was appointed and sworn by Ed. T. Smith, the notary public named in said notice of taking of testimony, to act as phonographic reporter; that I did correctly report in shorthand writing the proceedings had and testimony given in said matter, and transcribed the same into longhand; that the foregoing and annexed pages, numbered from one to twenty-one, both inclusive, contain a full, true and correct statement of the proceedings had and testimony given in said matter, and a full, true and correct transcript of my shorthand notes taken of the proceedings had and testimony given thereat.

Dated, Hanford, California, July 7th, 1916.

WALTER MOORE,

Official Phonographic Reporter of the Superior Court of the County of Kings, State of California. [95]

State of California,  
County of Kings,—ss.

I, Ed. T. Smith, Notary Public in and for the County of Kings, State of California, do hereby certify:

That the depositions of H. A. Beekhuis, A. Nieson and J. E. Hansford, witnesses produced on behalf of the defendant, were taken in the above-entitled cause in pursuance to the notice which is hereto attached,

before me, at my office, in Hanford, County of Kings, State of California, on the 6th day of July, 1916.

I further certify, that on said day I was attended by Frederick S. Lyon, Esq., representing the complainant, and by Nicholas A. Acker, Esq., representing the defendant, and by the above-named witnesses, who were of sound mind, and of lawful age, and by me first carefully examined, cautioned and sworn before the commencement of their testimony to testify to the truth, the whole truth, and nothing but the truth; and the depositions were taken by Walter Moore for me in my presence and in the presence of the witnesses, and the reading and signing of the said depositions were waived by counsel.

I further certify, that the reason for taking the depositions was, and is the fact, that the deponents live more than one hundred miles from the place where the said suit is appointed by law to be tried; and that the said testimony was begun on the 6th day of July, 1916, and finished on the said date.

I do further certify, that I am not attorney, nor of counsel for either of the parties in the said depositions and caption named, nor related to either by blood or marriage, nor in any way interested in the event of the cause.

My commission does not expire until April 29th, 1917.

IN TESTIMONY WHEREOF, I have hereunto set my hand, and [96] affixed my official seal, this 7th day of July, 1916.

[Seal] ED. T. SMITH,  
Notary Public, in and for the County of Kings, State  
of California.

[Endorsed]: Equity. Suit No. A—44. In the United States District Court, Southern District of California, Northern Division. Fred Stebler, Plaintiff, vs. Porterville Citrus Association, Defendant. Depositions of H. A. Beekhuis, A. Nieson and J. A. Hansford, Witnesses Produced on Behalf of Defendant. Filed Jul. 8, 1916. Wm. M. Van Dyke, Clerk. By Chas. N. Williams, Deputy Clerk. [97]

Equity. Suit No. A—44. Fred Stebler, Plaintiff, vs. Porterville Citrus Association, Defendant, Depositions of H. A. Beekhuis, J. A. Hansford and A. Nieson. Witnesses Produced on Behalf of Defendant. From Ed. T. Smith, Hanford, Cal. Registered No. 80. Clerk of United States District Court, Southern District of California, Northern Division, Los Angeles, California. Return receipt demanded. 31,909. Los Angeles, Cal. Registered Jul. 8, 1916.  
[98]

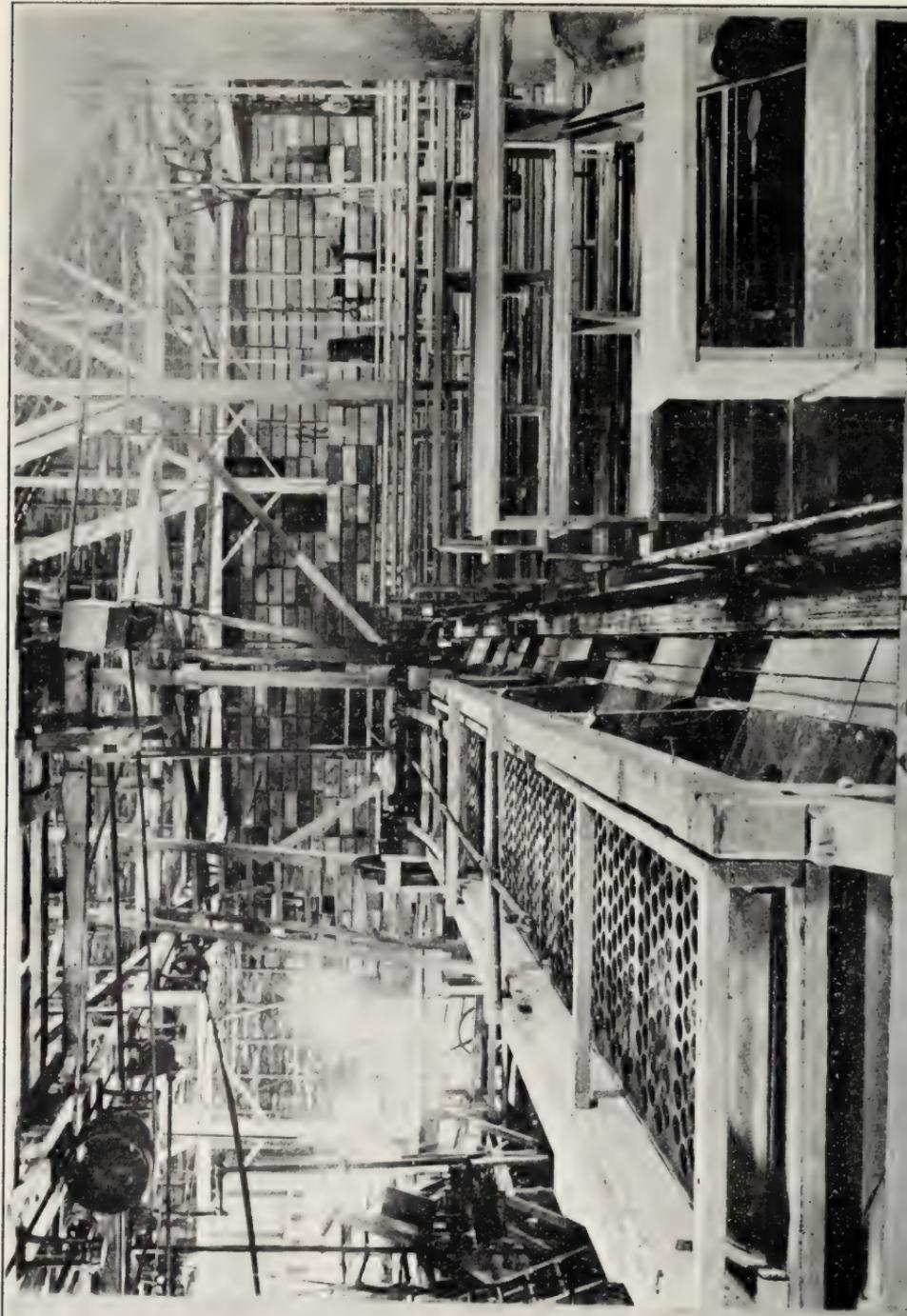
Hanford, Cal., July 7th, 1916.

M            N. A. Acker, Attorney at Law,  
                    To ED. T. SMITH, Dr.  
                    Searcher of Records.

## Abstracts and Certificates of Title on Kings County Lands.

Hill Building,  
Opposite Court House, Notary Public.  
Telephone Main 343J. Conveyancing.  
To taking depositions in Equity Suit No.  
A-44, in the United States District Court,  
Southern District of California, North-  
ern Division. 68 folios at .30¢.....\$20.40  
To swearing witnesses (4) oaths admin-  
istered ..... \$ 4.00  
Expense of mailing and preparing papers...\$ 1.20

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[Endorsed] : Filed Jul. 8, 1916. Wm. M. Van Dyke,  
Clerk. By Chas. N. Williams, Deputy Clerk.

[Endorsed] : Filed Jul. 8, 1916. Wm. M. Van Dyke,  
Clerk. By Chas. N. Williams, Deputy Clerk.

906,805.

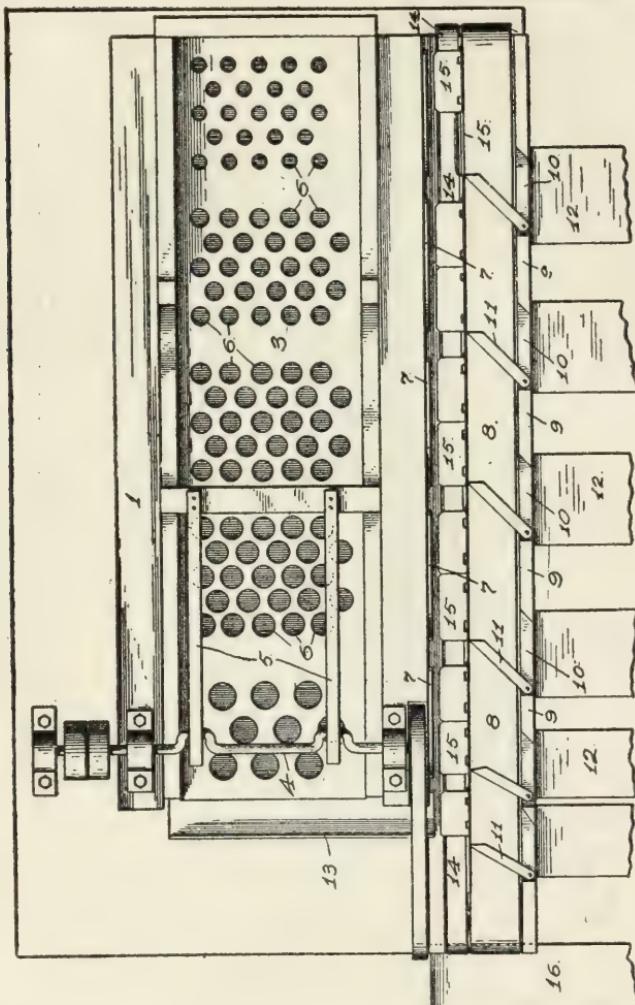
H. A. BEEKHUIS.

FRUIT GRADER.

APPLICATION FILED FEB. 20, 1908

Patented Dec. 15, 1908.

2 SHEETS—SHEET 1.



*Fig. 1.*

INVENTOR.

WITNESSES.

*Arthur G. Lee  
N. A. Coker*

Hermanus Albert Beekhuis  
by *Henry F. Booth*  
*his Attorney*

H. A. BEEKHUIS.

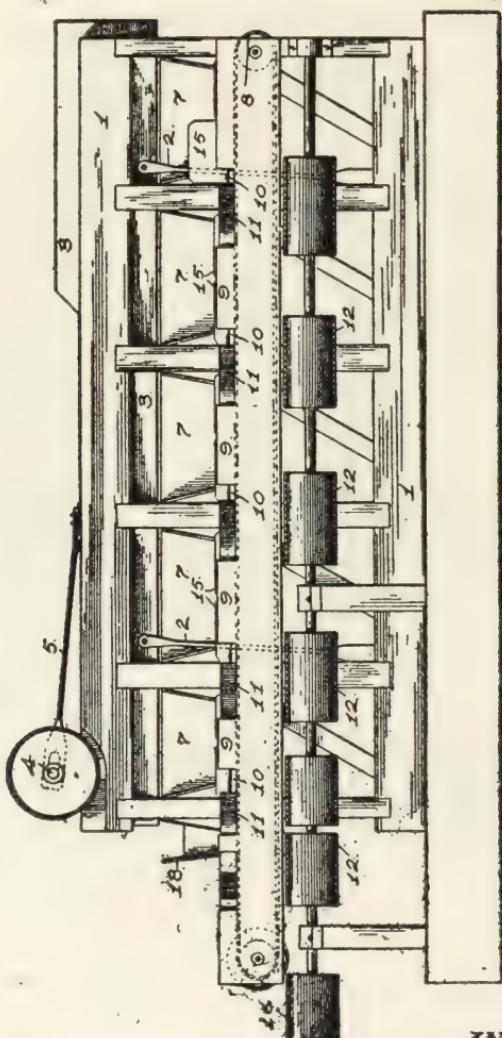
FRUIT GRADER.

APPLICATION FILED FEB. 20, 1908.

906,805.

Patented Dec. 15, 1908.

2 SHEETS-SHEET 2



INVENTOR.

## WITNESSES.

Arthur G. Clegg.  
John D. Arden

Hermanus Albert Beeckhuis  
By his & Booth  
his Attorney

## UNITED STATES PATENT OFFICE.

HERMANUS ALBERT BEEKHUIS, OF HANFORD, CALIFORNIA, A  
SIGNOR TO CALIFORNIA FRUIT CANNERS ASSOCIATION, OF SA  
FRANCISCO, CALIFORNIA, A CORPORATION OF CALIFORNIA.

## FRUIT-GRADER.

No. 906,605.

Specification of Letters Patent.

Patented Dec. 15, 1908.

Application filed February 20, 1908. Serial No. 416,819.

*To all whom it may concern:*

Be it known that I, HERMANUS ALBERT BEEKHUIS, a citizen of the United States, residing at Hanford, in the county of Kings 5 and State of California have invented certain new and useful Improvements in Fruit-Graders, of which the following is a specification.

My invention relates to the class of fruit-graders, and it consists in the novel constructions, arrangements and combinations of parts which I shall hereinafter fully describe.

The object of my invention is to separate 15 fruit according to size, and to rapidly, economically and effectively handle the different grades, thus adapting the machine for use in canning plants, where these results are important.

Referring to the accompanying drawings, Figure 1 is a plan of my machine. Fig. 2 is a side elevation of the same.

1 is a frame in which is supported, upon spring standards 2, the grading table 3, to 25 which a shaking motion is imparted by suitable means, here shown as consisting of the crank-shaft 4 and connecting links 5.

The grading table is provided with holes 6, arranged in groups, the holes in successive 30 groups, being graduated in size, those of the first group, at the head of the table where the fruit is supplied to it, being the smallest, and those at the foot of the table being the largest.

Under each group of holes is a chute 7, each chute leading and directing its fruit to a traveling carrier 8. The outer fixed guard 9 of this carrier has gate-ways 10, each of which is controlled by a switch-gate 11 40 which is adapted to be turned inwardly at an angle over the carrier, in order to divert the fruit thereon to and through the gateway.

Beyond each gate-way is a traveling carrier 12 which is supposed to lead to the canning tables or other destination for the graded fruit.

At the foot of the table 3 is a trough 13 which receives the largest size of fruit which 50 is unable to pass through the table holes, and delivers it to the carrier 8.

Now, in case any one grade of fruit is delivered at the canning table or other destination in too great quantity to be properly 55 handled, I provide for diverting said grade,

either in whole or in part, to supplemental or additional canning tables or destinations. This is done as follows:—Between the inner side of the carrier 8 and the delivery ends of the chutes 7 lies a supplementary traveling carrier 14, Fig. 1. Above this carrier are arranged swinging bridges 15, which when turned down overlie the said carrier and span the space between the delivery ends of the chutes 7 and the main carrier 8; and when turned up, bar the passage to said main carrier and expose the supplementary carrier, as is shown, in one instance, in Fig. 1. Each of these bridges is best divided into sections, so that either the whole, or only portion of the particular grade may be diverted to the supplementary carrier 14. At the end of the supplementary carrier is carrier 16 which leads to additional canning tables or destinations.

The operation of the machine is as follows:—The fruit, say, for example, previously divided, pitted and peeled peaches, is supplied to the head of the grading table and is thereon shaken and advanced. The smallest fruit drops through the first group of holes, and travels by gravity down the underlying chute 7, and over the turned-down bridge 15, to the carrier 8. Advancing with this carrier, the fruit meets and is deflected by the switch-gate 11, through the gate-way 10, to the carrier 12, by which it is taken to the canning table. Each grade is similarly and separately treated.

When desired, two or more grades may be blended; as, for example, if the smallest grade and the one next larger are required to be blended, the first switch gate can be left in position to keep its gate-way 11 closed, and the next gate may be swung over the carrier 8, in order to divert both grades to the same carrier 12. But, if there should be more of any grade than the operators at the canning table can properly handle, say, for example, the smallest grade, then the bridge 15 of this grade, or one section of it, as shown, is turned up to obstruct the passage of the whole or a portion of said grade to the main carrier 8. By this turned up bridge, or section thereof, said grade, or a portion of it, falls upon the supplementary carrier 14, by which it is carried along under all the other recumbent bridges, (which are high enough above said carrier to permit such passage) and is delivered to the end

carrier 16, which takes it to an additional canning table at which it can be handled.

Having thus described my invention, what I claim as new and desire to secure by Letters Patent is:—

1. In a fruit-grader, the combination of a grading table, underlying chutes to receive each grade, a traveling carrier common to all said chutes and to which they separately deliver their fruit, means for separately diverting the grades from said carrier, a supplementary traveling carrier, and means for diverting any grade from its course to the main carrier, to said supplementary carrier.
- 15 2. In a fruit-grader, the combination of a grading table, underlying chutes to receive each grade, a traveling carrier common to all said chutes and to which they separately deliver their fruit, means for separately diverting the grades from said carrier, a supplementary traveling carrier interposed between the main carrier and the delivery chutes, and means for diverting any grade, from its chute, to the supplementary carrier.
- 20 3. In a fruit-grader, the combination of a grading table, underlying chutes to receive each grade, a traveling carrier common to all said chutes and to which they separately deliver their fruit, means for separately diverting the grades from said carrier, a supplementary traveling carrier interposed be-

tween the main carrier and the delivery chutes, and swinging bridges overlying the supplementary carrier to normally carry the fruit from the chutes to the main carrier, 35 and adapted, when raised, to bar the passage of the fruit to said main carrier and to effect its delivery to the supplementary carrier.

4. In a fruit-grader, the combination of a 40 grading table, underlying chutes to receive each grade, a traveling carrier common to all said chutes and to which they separately deliver their fruit, means for separately diverting the grades from said carrier, a supplementary traveling carrier interposed between the main carrier and the delivery chutes, swinging bridges overlying the supplementary carrier to normally carry the fruit from the chutes to the main carrier, 45 and adapted, when raised, to bar the passage of the fruit to said main carrier and to effect its delivery to the supplementary carrier, and a carrier to separately dispose of the fruit from the supplementary carrier. 55

In testimony whereof I have signed my name to this specification in the presence of two subscribing witnesses.

HERMANUS ALBERT BEEKHUIS.

Witnesses:

D. H. LATIMER,  
J. H. FARLEY.

*In the District Court of the United States, for the  
Southern District of California, Northern Di-  
vision, Ninth Circuit.*

A-44—IN EQUITY.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

A-45—IN EQUITY.

FRED STEBLER,

Plaintiff,

vs.

MID-CALIFORNIA CITRUS ASSOCIATION,  
Defendant.

A-50—IN EQUITY.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

**Reporter's Transcript—July 11, 1916.**

Filed Aug. 8, 1916. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [106]

*In the District Court of the United States, for the  
Southern District of California, Southern Division,  
Ninth Circuit.*

Hon. OSCAR A. TRIPPET, Judge.

A-44—EQUITY.

FRED STEBLER,

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Defendant.

A-50—EQUITY.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

APPEARANCES:

For Plaintiff: FREDERICK S. LYON, Esq.

For Defendant: N. A. ACKER, Esq. [108]

Los Angeles, Cal., Tuesday, July 11, 1916.

10 o'clock A. M.

The COURT.—Stebler vs. Porterville Citrus Association, three cases. Have you entered into a writ-

ten stipulation about these cases?

Mr. LYON.—No written stipulation. I find my client, Mr. Stebler, has been delayed in getting here by some kind of accident, but I don't believe it will be necessary for us to wait at all.

Now, there are three of the cases; A-44 and A-45 involve identically the same machines, and I suppose it will be that A-45, the Mid-California case shall abide the issue in A-44. Is that correct, Mr. Acker?

Mr. ACKER.—Yes.

Mr. LYON.—And for the purpose of conserving time, as the issues in A-50 refer to identically the same machine as in A-44, those two cases may be heard together, and all of the testimony which is pertinent to one case will be referred to by counsel. Is that correct?

Mr. ACKER.—Yes.

The COURT.—Do you want to make any order about the reporter?

Mr. LYON.—Well, nothing except the reporter shall—

The COURT.—As a rule of court, I mean an equity rule, to which my attention was called, about transcribing testimony costs. It may affect the charging of the costs. [109]

Mr. LYON.—In that connection, the reporter will transcribe the entire testimony and file a transcript for the Court, and furnish counsel for each side with a copy of it. The original bill will be divided half and half and be taxable as costs.

The COURT.—That is the stipulation in the case.

Mr. LYON.—I suppose a short opening statement—

Mr. ACKER.—I would like, Mr. Lyon, before we proceed with a statement, I will request that counsel specify, in view of the fact that one of the patents in suit involves something like approximately forty claims, and the other a large number of claims, that counsel specify which of the claims of the Stebler patent cover the distributive system, that he relies on for infringement, and which of the claims of the Thomas Strain patent he relies on as to the charge of infringement.

The COURT.—I believe I have copies of the patents, haven't I, Mr. Lyon?

Mr. LYON.—I think you have, of two of them, not of the third.

The COURT.—Excuse me for a minute. I will get what I have. (Leaving room.)

The COURT.—All right, proceed.

Mr. LYON.—Of the Robert Strain reissue No. 12297, the claims involved are claims 1 and 10.

The COURT.—Now, let us read those two claims.  
(Reading): [110]

“In a fruit-grader, in combination a plurality of independent transversely-adjustable rotating rollers; a non-movable grooved guide lying parallel with the plane which passes vertically and longitudinally through the center of said rollers, said rollers and guide forming a fruit runway; a rope in the groove in said guide and means to move said rope.”

“In a fruit-grading machine, a runway formed

of two parallel members, one of said members consisting of a series of end-to-end rolls, brackets carrying the rolls, guides for the brackets, and means for adjusting the brackets upon the guides, substantially as set forth."

Mr. LYON.—Those are the two claims which are involved in the suit of Stebler against the Riverside Heights Orange Growers' Association and George D. Parker.

The COURT.—How is that?

Mr. LYON.—Those are the two claims which were involved in the suit of—

The COURT.—Oh, they were involved?

Mr. LYON.—Yes. And circuit number 1562, I think, in this court, and in the United States Court of Appeals, for the Ninth Circuit, No. 2292, the decision or opinion in which is reported in 205 Federal, page 735. I have a short and convenient pamphlet copy of the decision. (Handing copy of the decision to the Court.) Those claims have also been before this court several times, but that is the [111] Court of Appeals' decision. I hand you a pamphlet copy which contains an exact copy of the opinion of the Court.

The COURT.—Sir?

Mr. LYON.—That is an exact copy of the opinion of the Court in short pamphlet form.

Mr. ACKER.—That decision has been reported.

The COURT.—I don't understand you, Mr. Acker.

Mr. ACKER.—That decision is reported in the Federal Reporters.

Mr. LYON.—In 205 and 735.

The COURT.—Now, do you desire to call my attention to any particular part of this decision?

Mr. LYON.—Not at the present moment. I want to finish the election as to these claims counsel has asked.

Now, in regard to the Stebler patent No. 943,799, or distributing apparatus, we claim infringement of the claims 1, 2, 3, 4, 5, 6, 8, 11, 12, 14, 15, 16, 17, 18, 19 and 20.

The COURT.—Well, all except 7 and 9 and 10.

Mr. LYON.—And 13.

The COURT.—7, 9 and 10 and 13.

Mr. LYON.—That patent was before this court, as we will show your Honor before we get through, in the case of Stebler, plaintiff, against the Pioneer Fruit Company, Northern Division, No. 207, an action at law, which was tried before Judge Wellborn, and that pleading has been, or that suit has been pleaded in the bill of complaint, and a prior adjudication, [112] showing the validity of this particular patent.

The COURT.—That suit was against whom?

Mr. LYON.—The Pioneer Fruit Company, and we plead that the Porterville Citrus Association also became a licensee as to certain specified machines by settlement at that time. That, I believe, is controverted, however, by the defendant.

Mr. ACKER.—That the defendant denies.

The COURT.—You claim that the Porterville Citrus Association became a licensee of what?

Mr. LYON.—Of this Stebler patent No. 943,799, and of the Strain reissue patent No. 12,297, in regard

to some three particular specified machines, but not with regard to any other, and that, as in accordance with the terms of that agreement of settlement and license, they acknowledged the validity of these patents for all purposes, and when I say these patents, I mean the Strain reissue patent and the Stebler patents No. 943,799.

The COURT.—Now, that is denied, as I understand it?

Mr. LYON.—That is one of the issues.

The COURT.—From whom do you claim they became a licensee?

Mr. LYON.—From Mr. Stebler, after the decision in this case No. 207. They were operating either three or four of the machines, which in that case were held to have been infringements, and they paid a royalty and secured a license [113] for the further use of those machines, and agreed that the patents were valid and that they would not thereafter contest them or infringe them.

The COURT.—Was that in writing?

Mr. LYON.—The contracts are in writing, but I will have to prove the connection of the Porterville Citrus Association, as an association, with the particular subassociation which had the machines.

The COURT.—Oh, I see.

Mr. LYON.—That is the question of denial. There is no denial of the facts of those other machines. The only question is whether the Porterville Citrus Association control the litigation.

The COURT.—This association would be bound by that agreement?

Mr. LYON.—Yes.

Mr. ACKER.—Just one minute, Mr. Lyon. I understand you are making that statement as to the Porterville Citrus Association. We have a stipulation in this case that the Mid-California Citrus Association shall be bound by the decree rendered in this case. Now, of course, that stipulation does not apply as to any proposition relative to a license or non-license between this complainant and the Porterville Citrus Association.

Mr. LYON.—That is understood. Now, with regard to the third patent in suit, the Thomas Strain—  
[114]

The COURT.—Now, before you get away from that, what is the effect of whether or not they had a license or nonlicense on this case?

Mr. LYON.—Solely to prohibit them from contesting either of these patents, or whether it would be a novel invention.

The COURT.—That question would be left open to the Mid-California Citrus Association?

Mr. LYON.—It would be left open to that association. Now, referring to the Thomas Strain patent, No. 775,015, dated November 15th, 1904—

The COURT.—That is the original patent?

Mr. LYON.——which is a patent to another Strain, and not to the same Robert Strain, and which was subsequent to the Robert Strain patent, and that patent we charge infringement of claims 1, 5, 7, 8, 9, 10, 11, 12, 13, 16, 18, 19, 24, 26, 31, 36 and 37. The apparatus or machines which are charged to infringe each of these three patents were manufactured avow-

edly by George D. Parker, who was one of the defendants in the suit to which I called your Honor's attention, and which was decided by the Circuit Court of Appeals.

The COURT.—How is that, Mr. Lyon? The suit of the machines in controversy.

Mr. LYON.—Were manufactured by Mr. George D. Parker, one of the defendants, who was a party to the suit of Stebler [115] against the Riverside Heights Orange Growers' Association, and George D. Parker, decided by our Circuit Court of Appeals and reported in 205 Federal, 735, the decision to which I first called your Honor's attention. I think it will be stipulated, and I will ask Mr. Acker if that is correct, that Mr. Parker at his cost and expense, and under contract to that effect, is defending these suits.

Mr. ACKER.—I know nothing about any contract one way or the other.

Mr. LYON.—Well, Mr. Parker is defending the suits at his cost and expense openly.

Mr. ACKER.—The Porterville Citrus Association is defending the suits. I presume Mr. Parker, as the manufacturer, has undertaken to defray the expense of it.

Mr. LYON.—We can save time if you will tell us what the exact facts you are willing to stipulate in that connection are.

Mr. ACKER.—I don't see it has any bearing, Mr. Lyon. The materiality of it is not apparent. Mr. Parker is not a defendant—party defendant—to this suit or privy one way or the other.

Mr. LYON.—Well, we will proceed. The machines, as we will show, were put into these packing-houses by a Mr. George D. Parker, in actual competition with a bid from Mr. Stebler, and were under an agreement that if the Court held that they were infringements, then Mr. Parker agreed to [116] secure Stebler machines and place them in the packing-houses. I do not know how he was going to do that, but that was part of the asserted agreement, and therefore, as we will show the Court, it was in direct competition with our machines and for the purpose of taking our business away from us directly, and with a full knowledge on the part of the defendants, the nominal defendants, Porterville Citrus Association, or Mid-California Citrus Association, as upon the part of the actual defendant, George D. Parker, in this litigation, and I say actual defendant because we assert that Mr. Parker is actually controlling the defense of this litigation, and therefore that so far as this litigation is concerned, and so far as the patent reissue No. 12,297 to Robert Strain, and claims 1 and 10 thereof, the decision in the case reported in 205 Federal, 735, is *res adjudicata*, and that question if the validity of the patent, and of claims 1 and 10 is not open to dispute to these defendants, nor is there any contest to be made in this court, either by the complainant here, Fred Stebler, or by the defendants, as to the interpretation which must be placed upon and the scope given to claims 1 and 10 of that patent. In other words, that the decision of the Circuit Court of Appeals in that case, and the interpretation that they place upon those claims is binding upon all of

the parties, and upon the defendant, George D. Parker here, controlling the defense of these cases.

[117]

The COURT.—You say “defendant.” He is not an actual defendant?

Mr. LYON.—No; but I will assume the first thing I do in the case will be to prove the fact that he is actually controlling the defense and therefore avowedly and openly has done so and under contract to do so, and, therefore, inasmuch as he is the one that is really defending the suits, and at his cost and expense, he is really the real defendant, and that the nominal defendants, Porterville Citrus Association and Mid-California Citrus Association are bound and in his shoes.

Now, that statement, however, does not apply to either the Stebler patent on the distributing apparatus, No. 943,799, or to the Thomas Strain patent, No. 775,015, those being new, so far as the defendant Parker is concerned, as well as the nominal defendants, Porterville Citrus Association or Mid-California Citrus Association.

The evidence will show this: That after the bringing of the suits A-44 and A-45, certain changes were made in those machines whereby, instead of relying wholly upon the individual adjustment of the rollers to make the individual adjustment of the grading openings, the machines were more fully equipped, so that the belts could be adjusted toward and away from the roller, so that by pressing the portion of the belt toward the roller, the space between the roller and the belt would be varied, thereby varying the

width of the [118] discharge opening and getting the regulation of the discharge opening in that respect and in that connection.

The COURT.—I think you had better repeat that, Mr. Lyon.

Mr. LYON.—I say that after the suits A-44 and A-45 were commenced, and a motion for temporary injunction made, and an order to show cause issued, certain changes were made in the infringing machines. Certain of the locking devices for locking the upper adjustment for adjusting the rollers toward and away from the belt were removed, and reliance was evidently placed upon means for moving a portion of the belt upward toward the roller, so as thereby to control the distance between the surface of the belt and the surface of the roller, securing in that manner, by the adjusting of the belt upward, or away from the roller, as desired, the adjustment on the aperture between them, and thereby, the adjustment of the discharge opening.

The COURT.—Well, you are referring to that fastening device that slides up and down and makes the rollers go up and down, and the cleat that was put under the belt, which could be raised up and down?

Mr. LYON.—That is correct, only, as we shall contend, and attempt to prove by evidence, that the fastening of the upper adjustment has not been permanent, and as the machines now show, since this court inspected those machines, practically everyone of them show that the upper adjustments [119] have been moved, and that while they did at one time hammer down the top of the bolts, all that was neces-

sary to make that adjustment was to put a wrench on the adjustment and they could turn them up and down, and merely riveting over the top of the bolt would not affect a permanent locking of those upper adjustments. However, as the evidence will show, they did take out part of the adjusting means, not removed effectively, but they took out a locking means they originally put in the machines.

Now, the defenses in the case, I anticipate, are with regard to the Stebler distributing system patent, No. 943,799, both anticipation, lack of novelty, and noninfringement, and I anticipate that those are the same defenses in regard to the Strain patent No. 775,015, although before opening the evidence, if the court desires, why, we might have a statement from counsel as to both defenses.

The COURT.—I would like to understand the evidence thoroughly before we start into it. Have you got any models in court?

Mr. LYON.—I haven't any models; I have photographs. Have you any models?

Mr. ACKER.—We will probably use models as the case proceeds. I don't think it is necessary, if your Honor please, that I attempt at this time to reply to any of the statements made by my friend, Mr. Lyon, regarding the issues which he intends to prove, or as regards this license, or [120] whether these defendants are bound by the doctrine of *res adjudicata*. I must say, as I listened to it, a most remarkable statement was made relative to the doctrine of *res adjudicata*, and I prefer to reserve that for the argument of the case.

As I view the case, there is no action on behalf of these defendants which would justify the application of the doctrine of *res adjudicata*, or by which this court could apply that doctrine as to these defendants.

The COURT.—There is another rule that is not just exactly *res adjudicata*, but in these patent cases they call it “persuasive” ruling upon the court in following the decision of another court.

Mr. ACKER.—I am not at this moment, if your Honor please,—I am not attaching as to the decision of the Court, the decision as to the Strain reissue patent is the decision of our Circuit Court of Appeals, and of course this court is going to follow that decision irrespective of anything I may say, but I will also say that this court is bound by that decision and cannot go beyond it one way or the other; that is not the point I have reference to as to the doctrine of *res adjudicata*.

The COURT.—I thought you were alluding to that fact that Mr. Parker was not a defendant here, and therefore that the doctrine of *res adjudicata* against these defendants where they got a judgment against Parker would not bind these [120½] defendants.

Mr. ACKER.—The point I have in mind, if your Honor please, that this is a different machine, the machine as now charged as to infringement, and has never been involved in any litigation in this court, and was not involved in the litigation that went to our Circuit Court of Appeals. It is a different machine; not the same machine, and when we come to the argument of the case, I will refer to it more fully,

that where the machine charged to be an infringement is a different machine, and the defendants are different, and the machine is different, that the doctrine of *res adjudicata* does not apply. We are entitled to our full day in court and a full hearing as to that new machine, and that would make no difference, even if Mr. Parker was the defendant, and it was a new machine, he would be entitled to all the defenses that would apply in an original action, but that I will reply to in the argument of the case. And I wish to say that counsel had correctly stated our position. We deny an infringement of the Thomas Strain and of the Stebler patents. We deny invention in those two machines, and we also maintain and will prove that the Strain re-issue patent, if attempted to be enlarged to include in the scope of its claims the device which is now being used by these defendants, that then that patent is invalid.

The COURT.—Are you claiming a patent on your device? [121]

Mr. ACKER.—We claim a patent on that device we are using, and which is involved, and we have a patent on the device which is involved and which is charged to be an infringement of the Fred Stebler patent, and that we will produce and all proper evidence.

The COURT.—Have you got a copy of your patent?

Mr. ACKER.—A copy of our patent? Yes, if your Honor please. (Handing copy to Court.) This happens to be the only copy I have.

The COURT.—Sir?

Mr. ACKER.—This happens to be the only copy I have.

The COURT.—Is this a patent on that machine I saw?

Mr. ACKER.—That is a patent on what they charge to be the distributing feature, as an infringement of the Fred Stebler patent.

Mr. LYON.—What is the number of that?

Mr. ACKER.—His Honor has the number before him.

The COURT.—It is number 1,145,079, serial number 810,121.

Mr. ACKER.—And we will prove by the evidence that claim 10—I will look at the claim in a minute—I believe it is claim 10 on that, anyway, the last claim of that patent, covers the device which is being used by the defendants herein, and which is charged to be an infringement of the said Stebler distributing patent system.

Mr. LYON.—One other preliminary matter I overlooked. [122] There is in this litigation no contest as to the corporate existence of the defendants; that is admitted to be as alleged in the bill of complaint. There is no denial of the title to the Robert Strain reissue patent No. 12,297, and the Stebler No. 943,799, being in the complainant as alleged in the bill of complaint. That is correct, isn't it?

Mr. ACKER.—That is correct, yes.

Mr. LYON.—In regard to the Thomas Strain patent, I will ask counsel if he will stipulate that the title to that is in the complainant, as alleged in the

bill of complaint? I proffer him at this time certified copies of the assignments.

Mr. ACKER.—I will admit title, Mr. Lyon.

The COURT.—The plaintiff owns all of the patents in controversy which they claim?

Mr. LYON.—Yes; and I will ask that Mr. George D. Parker be called to the stand. [123]

#### **Testimony of George D. Parker, for Plaintiff.**

GEORGE D. PARKER, a witness called in behalf of the plaintiff, being first duly sworn, testified as follows:

##### **Direct Examination.**

(By Mr. LYON.)

Q. Your name is George D. Parker?

A. Yes, sir.

Q. You reside in Riverside, California?

A. Yes, sir.

Q. What is your business?

A. Manufacturer of fruit-grading machines and weighers.

Q. Are you the George D. Parker who was one of the defendants in that suit in equity in this court entitled Fred Stebler, complainant, against Riverside Heights Orange Growers Association and George D. Parker? A. Yes.

Q. I think the number of it was Circuit Court No. 1562, and it went to the Circuit Court of Appeals for the Ninth Circuit, case No. 2232 therein.

A. Yes.

Q. You furnished the machines to the Porterville Citrus Association and the Mid-California Citrus

(Testimony of George D. Parker.)

Association involved in the present case, did you? [124] A. Yes.

Q. You are defending those cases at your cost and expense, are you? A. Yes.

Q. And are under contract with the Porterville Citrus Association and the Mid-California Citrus Association to defend these suits at your cost and expense? A. I don't quite understand that.

The COURT.—Q. Have you got a written contract? A. Yes.

Q. (By Mr. LYON.) Have you that written contract with you? A. No.

Q. Well, I will ask that that written contract be produced here. You can't get it before to-morrow, I suppose, can you, now? Where is it?

A. I don't know, but I suppose it is in the shop.

Q. You agreed to defend these suits against the claim that they are infringements of Mr. Stebler's patents, did you? A. Yes.

Q. And you have had charge of the defense of these suits and retained Mr. Acker to defend them, didn't you? A. Yes.

Q. And you are paying for the cost of that defense at the present time? A. Yes. [125]

Mr. LYON.—That is all.

Mr. ACKER.—No cross.

#### **Testimony of Fred Stebler, for Plaintiff.**

FRED STEBLER, the plaintiff herein, called as a witness in his own behalf being first duly sworn, testified as follows:

(Testimony of Fred Stebler.)

Direct Examination.

(By Mr. LYON.)

Q. You are the plaintiff in this suit, Mr. Stebler?

A. Yes, sir.

Q. And in what business are you engaged?

A. Manufacture of packing-house machinery.

Q. And you are the same Fred Stebler who was complainant in the suit of Fred Stebler, complainant, against the Riverside Heights Orange Growers Association and George D. Parker in this court?

A. Yes.

Q. To which I have referred? A. Yes.

Q. And the owners of the letters patent here in suit? A. Yes, sir.

Mr. LYON.—I offer in evidence as Plaintiff's Exhibit 1, the Strain reissue patent No. 12,297; as Exhibit 2, the Stebler distributing apparatus, patent No. 943,799; as Plaintiff's Exhibit No. 3, the Thomas Strain patent No. [126] 775,015. By way of interruption, Mr. Acker, I believe that we have no stipulation in this case that printed, uncertified copies of patents may be used with the same force and effect as the originals, subject to correction.

Mr. ACKER.—I thought we entered into that stipulation the other day.

Mr. LYON.—If we haven't made that stipulation, it will be so considered?

The COURT.—I don't understand you.

Mr. LYON.—That we may use with the same force and effect as originals, these uncertified copies or

(Testimony of Fred Stebler.)

printed copies of patents, which are much more convenient to have.

Q. How long, Mr. Stebler, have you been engaged in the manufacture of fruit-grading distributing apparatus? A. About seventeen years.

Q. And where? A. At Riverside, California.

Q. (By the COURT.) Where does Mr. Parker live? A. At Riverside.

Q. He lives at Riverside, too? A. Yes, sir.

Q. You live there? A. Yes, sir.

Q. (By Mr. LYON.) Did you ever have any business dealings with the Porterville Citrus Association, the defendant? A. Yes, sir.

Q. State what it was. [127]

A. Well, I have sold them packing-house machinery and graders and other devices of similar import.

Q. Did you have any business with them during the season of 1914 or '15?

A. I think I sold them some material in 1914. In 1915 I solicited their business for some packing-house machinery which I did not get.

Q. Do you know what they did in regard to packing-house machinery during the season of 1915?

A. I understand they accepted Mr. Parker's bid for the work under consideration, and that he installed it.

Q. Did you ever see the machines as they were installed? A. Yes, sir.

Q. On how many different occasions?

A. Along at least three different occasions.

Q. What was the first occasion, approximately?

(Testimony of Fred Stebler.)

A. I think the first occasion that I saw those machines was the last week in last December, at which time, you, myself, and the judge of this court inspected those machines.

Q. That was the second time, you say?

A. That was the first time I saw them.

Q. (By Mr. LYON.) I show you four photographs, and ask you if you know of what they were taken, or what they represent? (Handing photographs to the witness.)

The COURT.—Four, did you say?

Q. (By Mr. LYON.) Four, I said. [128]

A. These four photographs represent these fruit-graders in the packing-house of the Porterville Citrus Association at Porterville.

Q. Did you ever see such machines in operation?

A. Yes, sir.

Q. Will you please explain to us the operation and mechanical construction of said machines, particularly with respect to the grading and distribution of fruit, the fruit bins, and the manner or manners of adjustment possible of the grading openings, and of the distributing apparatus?

A. At the time of making this inspection of these machines referred to in my previous answer, while the machines were not in actual operation, they did start them for us and run some fruit through them, and, of course, we saw that action; and describing that, the fruit was fed on to one end of the machine and was carried forward by a belt conveyor, which is at an angle transversely to the roller; this travel-

(Testimony of Fred Stebler.)

ing belt conveyor and the roller forming the grade-way. We noticed, of course, that provision was made for adjusting the openings in this grade-way, which is the function of the grading machine, and we noticed that originally provision was made for adjusting the roller at the points, or at the grading aperture which is made near the joint, and that for some reason they had attempted to show that those means or adjustment had been discontinued by riveting the binder bolts in the slotted fastenings, which slots were originally [129] provided for making this adjustment.

Mr. ACKER.—If your Honor please, I don't care to interrupt the witness, but he is testifying as to descriptions of the machine which he saw in operation, and the witness is telling what something was made for, and then it was abandoned or closed off. Now, he has no knowledge on that subject; that is mere guesswork on his part. I wish the witness would confine his answer to what he knows regarding the machine illustrated by those photographs.

The COURT.—As to why those things were built that way. Of course, that is only his opinion, evidently.

Mr. LYON.—My question asked him to explain any other mode of operation and construction of the machines, using the photographs as far as he could, from his knowledge and inspection of them.

The COURT.—Well, with that he may proceed.

Q. Tell what you know about it and don't give your opinion until you are asked about it.

(Testimony of Fred Stebler.)

A. Well, of course, while I am speaking from the photographs I have before me of this machine, yet these photographs are an accurate description of the machine, and when I look at the photographs, its equivalent, are the same thing to me as though I were looking at the machine, and my reference to these means of adjustment, as I understood was called for in the question, as adjustment is necessary. It is evident, I should say, from the appearance of these photographs, that these slotted castings were put there for a [130] purpose, the only purpose of which could be to accomplish this adjustment. I think it was explained at the time that we inspected these machines that such was the purpose of these castings originally, and it was also explained to us that for certain reasons this adjustment—they had chosen to undertake to abandon it.

Mr. ACKER.—Now, if your Honor please, I must object.

Q. (By Mr. LYON.) Instead of telling us what that conversation was, please tell us how these machines would work with that kind of adjustment, and so forth. That is the question.

Mr. ACKER.—The question calls, if your Honor please, as to his knowledge of this machine and whether these photographs represent that machine, and it is not necessary for this witness to give us his opinion.

The COURT.—I don't think so either.

Mr. ACKER.—We want the evidence as to that machine as he knows it, and he has testified that the

(Testimony of Fred Stebler.)

first time he inspected the machines was when his Honor was present.

The COURT.—All he said since he was interrupted will be stricken out.

Mr. LYON.—Please note an exception.

The COURT.—That is, if Mr. Acker wants it stricken out.

Mr. ACKER.—I wish it stricken from the record.

Q. (By Mr. LYON.) Now, Mr. Stebler, please tell us how with that machine, or with those machines, the adjustment of [131] the grading way can be or could be secured, as you inspected the same, from your own knowledge of the inspection of the machines.

A. The adjustment of the grade-way can be accomplished in two ways. It could be accomplished by adjusting the slotted castings shown at the top of these photographs on top of the machines by means of which the grading aperture could be altered, either made greater or less, and it could also be accomplished by adjusting the belt conveyor which forms one side of the grade-way.

Q. Now, you say adjusting these castings at the top would adjust the grading openings. Tell us how that adjustment could be accomplished in those machines.

A. Simply by loosening the binder bolts and sliding the castings and moving the bolts in the slots.

Q. And sliding these castings would affect what part of the machines?

A. It would affect the grading aperture by means

(Testimony of Fred Stebler.)

through the medium of moving the roller, the location of the roller, with reference to the opposing belt.

Q. Now, what was the form of those rollers in that machine?

A. They were elongated wooden rollers in sections, one end of which was of considerably reduced diameter.

Mr. LYON.—I will offer in evidence the four photographs.

Q. (By the COURT.) What do you mean by "elongated"? [132]

A. Well, what I mean by "elongated" was a wooden roller of considerable length.

Mr. LYON.—I offer in evidence the four photographs and ask that they be marked Plaintiff's Exhibits 4, 5, 6 and 7, respectively. Just mark them now, as I wish to use one of them immediately. (Photographs referred to were marked by the clerk.)

Q. Referring now to Plaintiff's Exhibit 7, what kind of a view of that machine is that?

A. That seems to be almost a top plan view; not taken exactly from the top, but enough above the machine to give practically a plan view of it and of the grading rollers and the grading aperture.

Q. Does this photograph show the rollers of two diameters of which you have last referred?

A. Yes, sir.

Q. Now, please explain first what the effect in that machine of adjusting one of the brackets at the small end of one of those rollers would have upon the grading or discharge opening made between it

(Testimony of Fred Stebler.)

and the belt, and also what effect, if any, it would have on the preceding gradeway or opening?

A. Well, adjusting any one particular bracket would have the effect of either increasing or decreasing the grade opening at that particular aperture, and the grade opening is in this case the small end of the roller. [133] In other words, the grade aperture is only at the small end of the roller. Therefore, moving this casting one way or the other, or moving this bracket, has the effect of increasing or decreasing this grade opening, but it would have no effect on any other grade opening absolutely. This particular grade opening only comes to the bracket adjustment. No adjacent grade opening would be affected by adjusting any particular bracket. [134]

Q. Why not?

A. Simply because the enlarged diameter of the roll precludes affecting a—precludes there being any great opening except at the reduced end of this roller.

Q. You are familiar with the Parker machines involved in the suit of Stebler against the Riverside Heights Orange Growers Association and George D. Parker and referred to by the Circuit Court of Appeals in its opinion as the Parker patent machine?

A. Yes, sir.

Q. And to the overlapping guide-arms of that machine? A. Yes, sir.

Q. What correspondence in function is there between the enlarged portion of the rollers and these machines of the photographs before you and such

(Testimony of Fred Stebler.)

overlapping guide-arms in the Parker patent machine?

Mr. ACKER.—The question is objected to as immaterial, irrelevant and incompetent. The record in that case is the best evidence, what machine was held in that case as being an infringement and the manner in which it worked, and it is further objected to as there is no testimony given by this witness as to ever having seen these machines with any adjustment imparted to the rollers. Now, the machine that was involved in the case that went to the Circuit Court of Appeals was a machine where the rollers were independently adjustable towards a traveling belt. [135] This machine your Honor inspected at Porterville, the witness has not testified so far that he ever saw any adjustment to these rollers. He says by some manipulation or mutilation, so to speak, of those machines you could do something. I object to that line of examination.

Mr. LYON.—Read the question in view of the argument. (Last question read by the reporter.)

The COURT.—Now, that is calling for the opinion of the witness, sort of an expert proposition.

Mr. LYON.—It is absolutely that. It is absolutely addressed to him as an expert. I think his qualifications as an expert for this case can be conceded and are sufficiently before the Court.

The COURT.—Well, the other machine has not been described yet.

Mr. LYON.—Well, that is all before the Court. It will be by reference to that case.

(Testimony of Fred Stebler.)

The COURT.—All right. The objection is overruled.

Mr. ACKER.—Exception.

A. The function, or the corresponding function between the enlarged end or diameter of this wooden roller of the Porterville Citrus Association and the graders involved in this case, and the overlapping guide-arms in the so-called Parker graders at the Riverside Heights Orange Growers Association is identical in that they simply block out and close the grade-way, so far as any grading aperture is concerned, in [136] both instances, the grading aperture being at a certain point. In reference to these overlapping guide-arms, they are, of course, the diameter of the roller in both machines.

Q. (By the COURT.) What do you mean by "overlapping guide-arms"?

A. The machines referred to having these devices, there was two wooden overlapping sticks in the grading aperture overlapping in this manner (indicating) in the grade-way or path of the fruit.

Q. But you are talking about these arms that run down towards the belt, towards the box.

A. I am, your Honor. There is a model of that machine in this court that was used as an exhibit in this case. The rollers in the machine were spaced a distance of about 18 inches or 20 inches, and from each roller there was extended an arm from adjacent rollers running in opposite directions which overlapped so that when you moved a roller those arms rolled.

(Testimony of Fred Stebler.)

The COURT.—Gentlemen, I will say to you that my education and information concerning drawings does not enable me to comprehend the mechanism as readily as I can by seeing a model.

Mr. LYON.—Let us see then, your Honor—

The COURT.—A photograph is better than a drawing ordinarily.

Mr. LYON.—I think then if we can take an adjournment at this time until 2, we can have that model brought up here; [137] it is downstairs.

The COURT.—Until 2? Can't you go ahead with something else?

Mr. LYON.—That is an examination regarding that particular thing.

The COURT.—We will take a recess of 5 minutes.

Mr. LYON.—I will ascertain if it is still upstairs during that 5 minutes.

(Recess.)

Mr. LYON.—We have brought down from the model room the model of the so-called Parker patented grader, as it was in the Court of Appeals in case number 2232, and was an exhibit in the suit 1562.

Q. Mr. Stebler, explain to the Court the overlapping guide-arms?

A. These are the overlapping guide-arms. (Indicating on model on table.)

Q. Now, in what respect was it that you said the enlarged ends of the rollers in the defendants' machines in this case correspond in function and effect to the overlapping guide-arms?

A. It will be noticed that these overlapping guide-

(Testimony of Fred Stebler.)

arms close the grading apertures. Without these overlapping guide-arms, of course, the fruit would not be carried from one grader to the next. The function is found in this roll here, instead of using the overlapping guide-arms, they simply extend the enlarged guide-arms, which has the [138] same force and effect of closing the grade-way, because it is obvious that oranges that will not go through here will be carried beyond, for the reason that the grading aperture is smaller. Therefore, the function of the enlarged diameter of this roll corresponds exactly to the overlapping guide-arms; so far as the closing of the grade-way is concerned, they are identical in function. The only difference between the overlapping guide-arms and the roller is that the overlapping guide-arms permit the longitudinal extension of the grading apertures which the rollers do not and are not essential.

Mr. ACKER.—Mr. Lyon, I would like to ask in order that the record may be clear and understandable, what is the materiality of this line of examination relative to this overlapping feature of the prior device?

Mr. LYON.—Simply a comparison of the defendants' machine as it now stands with the device which has already been held to be an infringement of this, and show that there is no material changes so far as infringement of the Robert Strain reissue patent claims 1 and 10 have been made, simply another colorable change like the modified Parker machines, held by the Master on the counting and by Judge

(Testimony of Fred Stebler.)

Bledsoe to infringe. In other words, that using the Porterville and Mid-California machines by adjusting on the top, why, it is an absolute infringement of claims 1 and 10 of the Robert Strain reissue, and practically identical as the same thing [139] as the guided machines.

Mr. ACKER.—If your Honor please, I object to this line of examination until it has been proven that there is an adjustability of the rollers, the sizing rollers of this Porterville machine. So far there has been no proof offered in this case.

The COURT.—I presume, Mr. Acker, the Court will have to decide that; it will have to decide whether those things are adjustable or not when the evidence is introduced.

Q. (By Mr. LYON.) Now, you, Mr. Stebler, also are familiar with the so-called Parker modified machines, which in case 1562 on the accounting before Lynn Helm, as Master, were considered, and which were shown to Lynn Helm at the Riverside Heights Orange Growers Association? A. Yes, sir.

Q. In what manner or to what extent does the arrangement of the belt and the roller section in these defendants' machines at Porterville correspond or differ in function and effect from the inter-relation of the belts and roller sections in those modified machines?

A. Why, there is really no material difference. There is some difference in the detail of construction and the manner of the making the roller mountings and placing them on the machine, but the co-

(Testimony of Fred Stebler.)

relation between the inclined conveyor belt and the roller is practically the same, and the machines [140] at the Riverside Heights Orange Growers Association had means for varying the grading apertures between the roller and the belt by means of moving the roll adjusting the roller. I find the same thing exists in the machines of the Porterville and Mid-California Associations.

Q. Where, in those machines, does that exist?

A. It exists, first of all, in this bracket shown in these photographs on the top of these machines wherein there are two bolts in slots, the adjustment being effected simply by moving the bolts in those slots and could have no other effect than to change the location of the roller with reference to the opposing belt conveyor. I also find in the Mid-California and the Porterville Association machines means for varying the grading aperture by adjusting the inclined belt conveyor.

Q. But referring now solely to the means for adjusting the roller sections and each one of the grade openings independently, you state that these bolts were riveted down when the Court inspected them in December last. To what extent were they riveted?

A. They appeared to be riveted all they could be.

Q. Was that an effective way of preventing the adjustments by that bolt and nut adjustment?

A. No, sir.

Q. Why not? [141]

A. Simply because by taking a wrench the nuts

(Testimony of Fred Stebler.)

could be turned enough to loosen them so the casting could be adjusted.

Q. Have you seen any of those machines since that time? A. Yes, sir.

Q. (By the COURT.) That is since that date I saw them, do you mean? A. Yes, sir.

Q. (By Mr. LYON.) Did you inspect any of these bolts at that time of this last inspection?

A. I was in the packing-house both of the Porterville Citrus Association and the Mid-California Citrus Association, I think, the first week in May of this year, at which time they were both in operation running fruit, and I went to each and every one of the machines and passed along them for the express purpose of noticing, if I could, whether adjustments had been *made them* since we saw them first in December, and it appeared to me, and I felt the appearances were clear, that a great many of these nuts had been backed up on the rivets, backed up where they had been riveted, enough to make an adjustment, not all of them, but I should say more than half of them.

Mr. ACKER.—Your Honor, I move to strike out the latter part of the answer from the record. The witness was asked, as I understand, whether any of them had been adjusted. [142] The answer is he saw nuts that appeared to him to be loosened.

The COURT.—That is his opinion. He could only give his opinion about that. He did not see them loosen them or otherwise. You can tell by the appearance of a nut whether it has been loosened or

(Testimony of Fred Stebler.)

not, I should think. Objection overruled—motion denied.

Q. (By Mr. LYON.) Now, Mr. Stebler, explain to us the adjustment of these defendants' machines at Porterville with respect to adjustment by moving a belt towards the small end of the roller sections? How is that accomplished in this machine? [143]

A. That is accomplished by the adjustment of a bolt and nut beneath the belt. In other words, in the belt support.

Q. And that causes a portion of the belt underneath the small diameter roller to be moved either toward or away from the belt?

The COURT.—From the roller?

Q. (By Mr. LYON.) From the roller.

A. Yes, sir.

Q. Proceed now and explain to us where the graded fruit is discharged in the defendants' machines, and how it is handled when discharged through the grade openings.

A. The fruit is discharged from the grade-way through the grading apertures, as we term them, which are the enlarged part of the opening, or the reduced end of the roller. Fruit passes from there to a series of conveyor belts, first of all, in the bottom of the machine and between the grade-ways. It passes from there out onto a distributing belt system running along an inclined deck at the upper edge of the receiving bins, and between the latter and the grade-ways in such a way as to be controllable as to where it shall be deposited.

(Testimony of Fred Stebler.)

Q. Now, what kind of bins are used in the defendants' said machines? A. Adjustable bins.

Q. Are these adjustable bins and partitions shown in [144] these photographs? A. They are.

Q. And they can be moved lengthwise of the grader? A. Yes, sir.

Q. As desired. Now, the bin space section corresponds in what degree with the length of the grader machine?

A. In this case it corresponds identically with the length of the grading machine—the grade-way.

Q. Is the last portion of the machine of the defendants used as a grading portion, or simply as an extension for bin space?

A. Well, there is an unused section at the last end of the grade-way in which the fruit passes; you might term it a grade-way. In other words, the grade-way itself terminates short of the bins and the aperture in that case simply takes care of the surplus, or anything that goes by.

The COURT.—I don't understand that.

A. Just at this end, the grade-way terminates with that roller. Everything beyond there drops through. (Indicating on the model.)

Q. (By Mr. LYON.) Then, in other words, the bin space is extended longer than the grade-way?

A. To that extent, yes.

Q. And what is this used for in the defendants' machines, as related to the adjustable bins and partitions?

A. It is used for the bin space. In other words,

(Testimony of Fred Stebler.)

the [145] bins extend in that sense beyond the grade-way enough to take care of this excess fruit.

Q. You are familiar, of course, with the devices manufactured under your—

Q. (By the COURT.) And then all fruit that wouldn't go through these other spaces would go off the grade-way after it passed these rollers?

A. Yes, sir; everything, large or small.

Mr. ACKER.—Just the same in this machine here and all other graders; they go over the end.

The COURT.—They go over the end, but yours would go off the side.

Mr. LYON.—It would terminate back there.

The COURT.—I say in this manner, it would go off the side, and here it would go over the end.

Mr. LYON.—Yes; that is right.

The COURT.—Is that right, Mr. Acker?

Mr. ACKER.—I think, your Honor, in these other devices they had things here to receive the fruit coming from here.

The COURT.—So far as this model is concerned, it would come off here.

Mr. ACKER.—We will come to that.

The COURT.—There are things that wouldn't come through here. Here now is the end of this thing. That is what they are talking about. The fruit would not be conveyed on past? [146]

Mr. ACKER.—This is what we call the overflow.

The COURT.—That is what I say. And that would come off the side?

Mr. ACKER.—Yes; as in all of them.

(Testimony of Fred Stebler.)

The COURT.—And this belt, it would hold on here until it got to the end of this roller.

Mr. LYON.—But as a matter of fact with this machine, Judge, they always provide something for this overflow to run off the side, but the point I was getting at, Mr. Stebler, was that the bin space on this machine of the defendants was extended longer than the grade-way? A. That is true.

The COURT.—This thing come out here longer? (Indicating on the model.)

Mr. LYON.—Longer than the actual grade-way.

Mr. ACKER.—To what extent?

Mr. LYON.—Well, the extent shown in the photographs is—

The WITNESS.—The extent of one bin.

Q. About 45 inches? A. Something like that.

Q. Now, can you tell us in what respects—

The COURT.—(Interrupting.) Has that got anything to do with this case?

Mr. LYON.—Yes; it will have to do with the distributing apparatus claims before we get through.

[147]

Q. Will you tell us in what respect, if at all, this distributing apparatus on the defendants' machines and to which you have referred, corresponds in interrelation of parts, or differs in interrelation of parts and functions with the distributing apparatus of your patent, Plaintiff's Exhibit 2?

A. Will you please read me that question?

(Last question read by the reporter.)

A. In my patent, a distributing belt extends be-

(Testimony of Fred Stebler.)

yond the grade-way, the function of which is to carry fruit beyond the point at which it egresses from the machine, not only as the depository for certain bins, but to also fill that bin its whole length, which could not be done except with some such traveling distributing means. I find that while the distributing means in these Porterville and Mid-California machines is different in detail from what it is in my machines, yet I find it performs the same function in practically the same way, for the reason that on my machine I employ a system of adjustable guide-ways with which to direct and determine the point at which this fruit is to be delivered to the bins. The same are to be found in these machines of the Porterville Citrus Association and the Mid-California Citrus Association.

Q. (By the COURT.) Their belt runs the other way from what yours does?

A. Yes; that is true, yet it accomplishes the same object. [148]

Q. (By Mr. LYON.) What has the adjustability of the bin partitions to do with this result of fruit distribution in the devices of your patent, Plaintiff's Exhibit Number 2, number 943,799, and in the defendants' machines at Porterville?

A. With a distributing system, its full value cannot be realized with stationary or fixed bin partitions. In other words, in order to be able to adjust or vary the size of these bins, is a very desirable object, and is facilitated very materially with this distributing belt, for the reason that there are times

(Testimony of Fred Stebler.)

when different bins—it is very desirable to vary them in size, lengthwise in the machine, and in order to do so, it is necessary to adjust the partitions, remembering, however, that since there are usually but ten grading apertures in the grader, there is a corresponding number of bins formed and created by these adjustable partitions. The size of these bins, however, are variable. It is very desirable, and it can only be accomplished to any perceptible extent by the use of the distributing belt, and as I said before, it is not alone the desirability to move these bins and change their location with reference to the grading aperatures, but since these bins sometimes are made as long as 6 feet, it is obvious that unless some means were provided for distributing this fruit—in other words, scattering it out lengthwise on this bin, the bin itself would be of no value, and it is [149] one of the functions that we get with the distributing belt, and which we accomplish with the distributing belt.

Q. Why would a 6-foot bin be used? Why do you want a longitudinal extensibility of the bin for a given grade?

A. For the reason that it sometimes happens that fruit of a certain size, as might be determined, for instance, the 216 size, which means 216 oranges to the box, might be running excessively heavy in proportion to the other sizes, and in order to take care of them, the ordinary procedure of having one packer to the bin would not take care of them, and they must have one, two or three packers to this bin

(Testimony of Fred Stebler.)

in order to keep it down, as they call it, and therefore it is necessary to longitudinally extend the length of these bins.

Q. Then, why is it desirable and necessary to distribute the fruit through such bins?

A. Simply because if the fruit is delivered from the grading aperture by gravity, or by any other means, it would not distribute it, it would all pile up in one end of the bin, and therefore the extension of the bin would be invariable. The distributing belt, in that case, as the bin fills up, helps to edge it along, and move it along, and granted that it will at the beginning, within the distributing belts, fill up at one end of the bin, then when it becomes filled, it begins to move along.

Q. (By the COURT.) You mean, does it automatically? A. Automatically, yes, sir. [150]

Q. (By Mr. LYON.) When did you first put out a machine with a distributing apparatus like or embodying the invention of Plaintiff's Exhibit Number 2?

A. In the fall, I think, in October of 1907.

Q. That was prior to your application for letters patent? A. Yes, sir.

Q. And to what extent has such invention gone into use?

A. Well, practically every packing-house in the country now has become acquainted with its value; so much so, they demand it.

Q. In other words, at the present time practically no fruit-grading machines are being put out without

(Testimony of Fred Stebler.)

these distributing machines; it that correct?

A. Practically none.

Q. (By the COURT.) When did you say that you got out this patent?

A. The first machine was installed, I think, in October, 1907.

Q. (By Mr. LYON.) Where was that installed?

A. At the packing-house of the Mountain View Orange & Lemon Growers Association at Upland, California.

Mr. LYON.—We offer in evidence, in connection with the testimony of this witness, the judgment-roll, including the decrees in suit number 1562, Stebler against the Riverside Heights Orange Growers Association and George D. Parker. [151]

Mr. ACKER.—Objected to as immaterial, incompetent and irrelevant, and on the further ground it is a record of this court, and it is needless to encumber the record by the introduction of this evidence.

The COURT.—No; I think these records have got to be introduced in evidence at this time. I don't think the Court takes judicial notice of its records. The objection will be overruled.

Mr. ACKER.—Exception.

The COURT.—I think we will suspend, Mr. Lyon, until 2 o'clock now.

(Whereupon, at the hour of 12 P. M., an adjournment was taken until 2 o'clock P. M., the same day.)

[152]

(Testimony of Fred Stebler.)

AFTERNOON SESSION—2 o'clock P. M.

FRED STEBLER, recalled.

Direct Examination Resumed.

(By Mr. LYON.)

Q. I show you another photograph, Mr. Stebler, and ask you, if you know of what that is taken? (Holding photograph to witness.)

A. This is a photograph of the same machine in the packing-house of the Porterville Citrus Association, taken from a different end, or opposite end from the others.

Mr. LYON.—We offer this in evidence as Plaintiff's Exhibit 8.

Q. You state that prior to the installation of this apparatus by the defendants you had been in negotiation with them to supply them with the graders and distributing apparatus. Are we to understand from that that prior to that time, and prior to the season of 1915 they had been using some of your graders with your distributing apparatus in that packing-house? A. Yes, sir.

Q. Are you acquainted with John A. Milligan?

A. I met Mr. Milligan, yes.

Q. Is he in any manner connected with the Porterville Citrus Association?

A. He is their manager. [153]

Q. I show you three letters, and ask you if you know what they are? (Holding papers to witness.)

A. They are letters received by me from the Porterville Citrus Association.

Q. And do you know the signature thereon?

(Testimony of Fred Stebler.)

A. Signed by John A. Milligan, secretary and manager.

Q. You received these through the United States mail? A. Yes, sir.

Mr. LYON.—We offer these letters in evidence as Defendants' exhibits—

The CLERK.—Plaintiff's Exhibit 9.

Mr. LYON.—Plaintiff's Exhibit 9.

The COURT.—Now, I will say, are these letters here going to have to be read? In any event, to see what the objection is to them, suppose you read them —either you or Mr. Acker, and then if Mr. Acker desires to make objection to them—

Mr. LYON.—We can have the reporter copy them in the record, and then Mr. Acker at any time before the close of the testimony can make any objection to them he wants to.

Mr. ACKER.—If there is any objection to be made to them, it had better be made before they are read into the record.

The COURT.—Do you want to read the whole letters?

Mr. ACKER.—I object to them, any way, as immaterial, irrelevant and incompetent. [154]

Mr. LYON.—The first one is dated August 16, 1915. (Reading:)

“Porterville, Calif., Aug. 16, 1915.

Fred Stebler,

California Iron Works,

Riverside, California.

Dear Sir: I returned from the city Saturday

Evening. I managed to get the Board of the Packing House Co. together today so as to consider the matter of the New Equipment and the Bids on the same. I give herewith a copy of the resolution deciding the matter:

'Moved by Brey and seconded by Orr that we authorize the Secretary and Manager—Mr. Milligan—to enter into a contract in proper form, with Mr. Geo. D. Parker of the Parker Machine Works of Riverside, Calif. for the installation of an equipment for our Packing Houses as outlined in the plans submitted and according to the specifications relating thereto and as a part of the same; and upon the terms quoted.'

This motion was unanimously adopted.

I am returning to you as per agreement the plans you furnished. I may say that the uncertainty as to the use of old material in your proposition did not commend it to the Board. And another thing with the equipment as per your plan is that there is not enough room to allow for a satisfactory system of sorting tables. Takes up too much room.

Mr. Parker is perfectly willing to give us the privilege to select any Sizer we may choose. We expect however to install [155] his new Sizer.

Truly Yours,

PORTEVILLE PACKING HOUSE CO.

JOHN A. MILLIGAN,

Secy."

The second letter is dated November 1, 1915, and addressed to Fred Stebler. (Reading:)

"Dear Sir: Received a notice from you some days ago concerning the installation in our packing house of a dryer by Mr. Parker. In this you claim that this infringes on certain of your rights and that suit is to be filed against the same.

We also received today a notice from presumably your attorneys concerning suit to be begun against Parker in the matter of the new sizers, to which we are to be made a party, unless we dismantle and discontinue the use of these sizers. The time limit being set as Nov. 2, 1915.

We regret that you and Parker have so much trouble in keeping your interests separated to your mutual advantage. As packing house people we would be glad to help you both in any way we can. If there is no other way for you to settle your difficulties than fighting in the courts of course we can do nothing but look on as interested spectators. But as to our business matters in the using of the machinery available for the most advanced packing house equipment we are after the latest and the best. It is for us to require absolute protection against loss or interference in our packing operations which ever way these cases may be decided. If the goods [156] we have contracted for from Mr. Parker do not belong to him, or any part thereof are not his, we will expect him to meet all claims and clear the title to us or we will meet the claims ourselves and deduct the amount involved from his account.

As to the time limit of one day to obey the mandate of your attorneys we certainly have a right to look

(Testimony of Fred Stebler.)

upon it as not only a bluff but one of special variety. In the first place the only way to stop installation or use would be the securing of an injunction. In such case we would have a right to a hearing. It will not pay you to antagonize too much the packing-house people as they will not submit to being forced too much. I know you have lost out in this district and will lose out more as the result of your attitude toward us.

Hoping that these matters may all be adjusted satisfactorily to all concerned soon.

We are Truly Yours,

POTERVILLE CITRUS ASSN.

JOHN A. MILLIGAN,

Secy. & Mgr."

The third letter is dated November 6, 1915, addressed to the same party at the same place. (Reading:)

"Dear Sir: Your favor received. After reading it over carefully with a view to become familiar with its import, the first thing I did was to look over my letter to you of date—Nov. 1st, to see what there was therein to occasion the venom of your reply. I have gone over it item by item and [157] tried to see each view point that might be taken. After doing so I cannot but assert that there is nothing in my letter to justify the views you have taken.

In the first place I want to reaffirm what I said in my letter referred to. In doing this it is necessary for me to refer to the several parts of the letter.

First. My acknowledgment of the receipt of the notice from your attorneys and also one from yourself, on a different matter was, I claim, in good form. I do not think that I was called upon to state to you the nature of the answer made thereto. You can get this from your lawyers. I submit therefore that my letter in this part was all right.

Second. With regard to the reference concerning who are to be made parties to the suit, that you claim we are in error about, my letter states the case as given in the notice, and we made no mistake, for we well understood that action would be brought against us. Your attorneys could not fail to see from our answer to their notice that we were cognizant of this fact. Your information therefore is no surprise. This has been your method heretofore and we knew we were still having to reckon with Mr. Stebler. I insist again that my report and answer was proper.

Third. The expressions of regret concerning the troubles between you and Mr. Parker which I offered, is perfectly legitimate. Why should we not regret these circumstances and so express ourselves. If I am to judge of [158] the sentiments of people from their voluntary expression of opinion, I think I can speak for many of the packing-house people when I say that we have reason to regret the fact that those who are in the manufacturing business cannot so harmonize their interests as to make it impossible for us to get the very best goods there are in the market, or that can be made

available for use without being threatened and bulldozed and placed at the risk of possible delay in our packing interests through litigation. It matters not to us whether we pay Parker or Stebler, or in addition to paying the cash value of the article, we have to pay a royalty to one or the other, providing we get what we wish and the article gives us the service. I repeat, therefore, that it is our business to go after the latest and best. If there arises trouble between those who are furnishing us equipment, or any part thereof, we certainly are willing to help toward any amicable adjustment if thereby we can secure the best by paying tribute to those whose claims demand it. I think I am right therefore in saying that we are interested spectators in any conflict of claims pending settlement in the courts. So there is no sarcasm in this part of my letter. The letter will bear analysis and there is nothing contained therein to justify you in the statement 'that we are appropriating something that does not belong to us.'

Fourth. In the matter of our requiring protection from those who install our equipment for us, to which my letter [159] refers as the clearing of title, this means just exactly what was intended and what you know I required of you and Mr. Stamm when you figured on our equipment, the same as in the case of Mr. Parker. This was a guarantee of protection against loss from litigation and expense of same as well as a guarantee on efficiency and material and workmanship. We think we had

the right to do this and we think we have the right to seriously doubt that any court will go so far as to say that the packing-houses will all of them henceforth use only the Stebler sizers.

We anticipated that there might be litigation and in such case, or any contingencies involved, we endeavored to protect ourselves. If the courts should decide that the new Parker sizer is an infringement on the Stebler and fixes an indemnity Parker will have to pay the same, or if the courts say that Parker's new sizer cannot be used then Parker will have to furnish us with two new sizers. And Mr. Parker was man enough to assure us that in such case he would furnish the Stebler sizers if we wished them. Therefore I again insist that my letter was fair enough in stating the case. And we are doing you no wrong.

Fifth. On the matter of the one day limit which might at first seem to justify you in your criticism of my apparent forgetfulness, I want to say that my characterization of it as a special variety of bluff is no misnomer. You must have known and your attorneys should have known that the sizers were not in use but in process of being installed and to [160] dismantle the same in the time specified was an impossibility. If it was not a bluff, therefore, any other term used might have reflected on the intelligence of those who designed the requirement. I used the word bluff because you had used it in your letter to me. If we had been frightened into an attempted compliance with the demand it

certainly would have been a bluff all right.

You speak as if we did not take the notice seriously. We did take it seriously and made answer without changing our opinion as to character of the one day notice. As to former notices you gave, they were in the form of warnings from your view point and from ours they were considered as threats, but in neither case did they prove anything as to whether the new sizer of Parker was an infringement of your rights and that is the one question that has to be settled and in which we are interested.

Sixth. My suggestion in the words: It will not pay you to antagonize too much the packing house people as they will not submit to being forced' is evidently misinterpreted by you. This was intended as a friendly word and as such I repeat it with the additional emphasis that is given in the light of your letter. You have a perfect right to the use of your patents and protection against infringement by any one. This fact we have recognized in our requirements from Mr. Parker. We, however, recognize our own rights of choice in selecting what we thought was best for us, considered in [161] relation to our needs. If what we have selected belongs to you instead of Mr. Parker, as you claim, then we are interested in having the courts decide this, and in such a case, as we have already intimated, Mr. Parker will have to recognize your rights and protect us. There is nothing wrong about this as far as I can see and we are not worry-

ing over the pending trial. Go ahead, we are interested spectators even though we may be dragged into court because we are the innocent purchasers of goods over which you and Parker are fighting. We are not afraid of any action in the courts against us because we have refused to be influenced by your system of bulldozing. We have not stolen anything nor in any way taken advantage of any one and your abuse of us in your letter cannot injure us but it certainly puts you in a very unenviable light. There is no need of this. You are in business and we will doubtless need many of the supplies you only can furnish. But that is no reason why we should not select the goods of others if they suit us better. If these goods cannot be delivered to us owing to you having strings on them then it is up to the parties who propose to furnish these goods to look after the strings.

Your letter of July 27th last and also one of Aug. 17th as well as conversations with me in this office—all of these before the contract was let, were calculated to impress on one the feeling that you were using pressure to force us to the putting in of your machinery, exclusively, [162] or the machinery in which you were interested. I do claim that this policy creates antagonism. Not to do you injury in any positive way but to as far as possible have no business dealings. Despite this, if your equipment had been best suited to our needs and to fit in to the space available and the price had been right we would probably have given you the con-

tract. It was not prejudice or malice as you insinuate, but facts and figures that lost you the contract with us. Again I say, go ahead and have the matter decided legally as to whether the new sizer by Parker is an infringement on your rights. We are interested in having this done and in this attitude we are as much your friends as we are Mr. Parker's friends.

Now as to the charges you make against me personally I will say this that you are absolutely mistaken and have no warrant for the conclusions to which you come as expressed in your letter. A letter which if you had taken time to think over and realize its character you probably would not have written it. You imagine that I have done you an injury, but if the future teaches us anything it is more likely to teach you the folly of trying to force people to do business with you in an undue manner than it will teach us not to cross the path of Fred Stebler. I have not injured you in any way. You have been injuring yourself and are likely to do yourself more injury in the future, if this letter is a sample of what you give those who for whatever reason fail to give you their [163] business.

If you had been as willing as Parker was to install for us any machinery we might select that was adapted to our needs and that was possible in relation to our floor space and had the price been satisfactory you would have had as good a chance as Parker to get the contract. I certainly could have

done a great deal more for you under those circumstances.

I can assure you that as far as I am concerned, there will be nothing put in the way of your doing all the business in this district in the future that is possible. I expect to do business with you myself. We need your goods and are not prejudiced against them particularly. They have been so far the best we could get. But if there is any better available do not blame us for trying to get that. The new sizer of Parker's gives promise of being much better. This of course has to be proven by actual use. It seems to be a wholly different proposition from yours and for particular use is much the more desirable, if it proves a success. If he infringes on your rights in its construction that is for you and he to decide. Or rather for the courts to settle. If this sizer is a success and we cannot get it from Parker because it is yours then we will want it from you. Will the courts sustain you in the position that we cannot have the machine we want?

As far as I am concerned, if any machine is invented [164] or any improvement is added to any machine that will be of advantage to the industry with which I am connected I will hold myself free to promote it whoever may be the inventor. Of course always with due regard for the rights of others. You and I certainly can remain as friends on these terms and neither of us need worry over trying to run either 'The territory of Tulare Co. or the universe.' Nor will there be any danger

of your going to the 'almshouse' because of 'incompetency' or me going to the penitentiary because I have 'wilfully and maliciously appropriated without regard to equity the property of another.' "

Trusting sincerely that the pending litigation may soon clearly define your rights and those of Mr. Parker in relation to the new sizer,—which by the way is a dandy as far as appearances go—so that in case it proves a success we may continue the use of it. Three sizers are adapted to our house whereas yours are not.

I think you and I can afford to be friends and both of us be men.

Truly yours,  
PORTERVILLE CITRUS ASSN.,  
JOHN A. MILLIGAN,  
Secy. & Mgr. [165]

Mr. LYON.—Now, of course, there is a great deal in all three of those letters which is not absolutely pertinent to the issues of this case, but they do show the willful character of this infringement; in the first place, they show the absolute notice at all times that the defendants have had of the rights of Mr. Stebler, and they show the very fact that the real defendant and the man who is conducting this defense here has contracted that he will in some manner even secure the Stebler sizers in case the court holds these devices are infringing, and it seems to me these letters characterize the character of the acts of the defendants herein, and are material to prove not only notice, but prove that they

(Testimony of Fred Stebler.)

went ahead and invited the contest, and for that reason they are offered in evidence, and for all purposes for which they are competent, and they cannot be said to be entirely incompetent, irrelevant or immaterial, which is the objection.

The COURT.—Do you desire to be heard, Mr. Acker?

Mr. ACKER.—No reply.

The COURT.—It seems to me like the letters are material. The objection will be overruled.

Q. (By Mr. LYON.) In the year 1910, Mr. Stebler—

The COURT.—He spoke of the wilfulness. Is that a material issue in that case?

Mr. LYON.—Yes; that goes to the question of damages.

Mr. ACKER.—Not at all on the hearing of the question [166] of the issues of infringement; that is a matter of accounting, if it should be an infringement. The question we are called upon to decide now is whether this machine, being used by these defendants' constitutes an infringement of the patents; that is the sole issue at this time.

Mr. LYON.—We have shown the court that it is in wilful disregard of the patent, and if you find that the patent is valid and the patent is infringed, then your decree may order treble damages, and that question of whether you hear all those questions is within the discretion of the Court, whether you will order treble damages by the interlocutory decree, or afterwards, and all of these facts are cer-

(Testimony of Fred Stebler.)

tainly material on the question of the knowledge and the character of the actions of the defendant.

Mr. ACKER.—The question of damage is a matter that comes up on the final decree, after the interlocutory decree, and on the accounting.

The COURT.—Read what Mr. Acker said.

(Last statement of Mr. Acker read by the reporter.)

The COURT.—Well, proceed, Mr. Lyon.

Q. (By Mr. LYON.) In the year 1910 you were acquainted with the H. K. Miller Manufacturing Company, were you, Mr. Stebler?

A. Yes, sir.

Q. That company supplied certain graders and distributing systems to the Pioneer Fruit Company at Lindsey, did it? A. Yes, sir. [167]

Q. And a suit No. 207 in the Northern Division of this court was brought by you? A. Yes, sir.

Q. On this Robert Strain Reissue Patent, Plaintiff's Exhibit 1, and the Stebler Distributing Patent, Plaintiff's Exhibit 2. A. Yes, sir.

Q. That case was tried before his Honor, Judge Wellborn? A. Yes, sir.

Q. And a judgment rendered that both patents were valid and infringed? A. Yes, sir.

Mr. LYON.—We offer in evidence the judgment-roll in that case, so that—

Mr. ACKER.—Objected to as immaterial, irrelevant and incompetent.

The COURT.—Overruled.

(Testimony of Fred Stebler.)

Mr. ACKER.—Not embodying any issues of the present controversy.

The COURT.—I will overrule the objection.

Mr. ACKER.—Exception.

Q. (By Mr. LYON.) Subsequent to that judgment, did you settle with the Porterville Citrus Association for the use of any of the type of machines that were covered by that judgment? [168]

A. I did.

Q. What machines?

A. Machines that they were using in their Plano house.

Q. And they took a license for the two or three machines that the Porterville Citrus Association was using in their Plano house?

A. Well, since I come to think about it, I think there was another house involved in that, which was the Boydston house, which was also involved in that settlement.

Q. And they paid \$188.50 damages on each machine? A. Yes, sir.

Q. And in that contract they agreed to the validity of both the Stebler Distributing Apparatus Patent, Plaintiff's Exhibit No. 2, and the Strain Reissue Patent, Plaintiff's Exhibit No. 1, claims 1 and 10?

A. I believe so.

Q. And agreed at no time to further infringe?

A. I believe that was part of the basis of the settlement.

Q. Since the date of the issuance of Plaintiff's Exhibit No. 2, the Stebler Distributing Apparatus Pat-

(Testimony of Fred Stebler.)

ent, to what extent, if at all, have the rights of that patent been respected and recognized by the trade and public, or contested by them?

A. Well, they have not been contested except in the case of this Pioneer Fruit Company and this case at issue here.

Q. To what extent have you sold and manufactured distributing [169] apparatus in accordance with it?

A. We have had a very extensive and growing business ever since this machine came out.

The COURT.—That wouldn't mean anything.

Q. (By Mr. LYON.) Well, you say extensive and growing. What proportion of the machines that have been installed have been equipped with that distributing apparatus?

A. Practically all of them.

Mr. LYON.—You may inquire, Mr. Acker.

Mr. ACKER.—Let me have those photographs.

The COURT.—These photographs you have put up here are not marked.

Mr. LYON.—That is a set I provided simply for your convenience. I will have them marked.

The COURT.—It is not necessary to mark them, then, if you have got them correspondingly marked.

#### Cross-examination.

(By Mr. ACKER.)

Q. Mr. Stebler, you have testified as to certain photographs which have been marked and introduced in evidence as Complainant's Exhibits 4, 5, 6 and 7. When were these photographs taken?

(Testimony of Fred Stebler.)

A. I think some time last November.

Q. That was prior to your first inspection of the packing-house of the Porterville Citrus Association?  
[170]

A. Yes, sir.

Q. Were they taken by you? A. No, sir.

Q. I call your attention more particularly to the photograph which has been marked Plaintiff's Exhibit No. 5, and to the forward end portion of said photograph, the left-hand side, and direct your attention to what appears to be some strips arranged transversely of the conveyor belt, and at an inclination. What are those strips and what do they represent?

The COURT.—You mean those—

Mr. ACKER.—Bars.

A. They appear to be guide sticks on the distributing belts.

Q. Did you ever see the machine in operation with those so-called guide sticks arranged in any such manner?

The COURT.—You mean those in the form of a triangle?

Mr. ACKER.—Yes, your Honor.

The COURT.—All right. I know what you are talking about now.

The WITNESS.—I don't recall that I have seen it in operation set at that angle, no.

Q. (By Mr. ACKER.) Then you were incorrect in your testimony when you stated that photograph Exhibit 5 represented the machine as you saw it in

(Testimony of Fred Stebler.)

the course of your inspection; is that correct? [171]

A. I wasn't speaking of that part of the machine. I was speaking of the grader at that time.

Q. The grader. What do you term the grader in the said photographs?

A. The sizing apparatus, or the grading apparatus.

Q. Do you mean that portion which extends from the feed end of the machine to the discharge end, and which has a rotating wall member, appearing immediately above the carrier, is that the grader?

A. That is part of the grader; yes, sir.

Q. What constitutes the grader in this device, Mr. Stebler?

A. The wall member, the roller or wall member as you speak of, and the traveling conveyor.

Q. Those two members, they constitute the grader?

A. They constitute the grade-way.

Q. What is the grader?

A. The grader is made up of that portion, with this other added paraphernalia. For instance, its mountings for the roller and the support for the belt, and so on.

Q. And in the device of the Porterville Citrus Association and the Mid-California Citrus Association, the defendants herein, does the roller member consist of a series of connected sections which are driven in unison from power applied from one end of the machine? A. Apparently so. [172]

Q. Is that or is it not a fact?

A. Apparently so; I didn't examine it minutely, and I didn't take it apart, but that appears to be the construction.

(Testimony of Fred Stebler.)

Q. Your examination of the machine was sufficient to enable you, one skilled in the art, to state whether it rotates in unison?

A. That was my impression.

Q. Well, do you not know, as a matter of fact, that is so, Mr. Stebler? A. No, sir; I do not.

Q. Then your knowledge is not sufficient to enable you to answer the question?

A. I consider that I have answered the question.

Q. In the device represented by the letters patent Complainant's Exhibit 1, which is the Robert Strain patent, Re-issue Patent No. 12,297—

The COURT.—Now, let us see. Wait a minute.

Mr. ACKER.—That is the first patent.

Q. Exhibit 1 is the Thomas Strain?

Mr. ACKER.—That is the Robert Strain.

The COURT.—All right; that is Exhibit 1.

Q. (By Mr. ACKER, Continuing.) The fruit runway consists of a traveling rope and a series of opposing independently mounted rollers. Is that not a fact? A. That is a fact. [173]

The COURT.—What are you reading from?

Mr. ACKER.—I am just calling his attention to the patent.

Q. The device of this patent, and that held true regarding the model of the Parker device which was introduced in evidence in case No. 2232, held to be an infringement, is it not? A. Yes, sir.

Q. Now, in the Parker device which was held to be an infringement, each roller of this series of longitudinally disposed rollers was independently ad-

(Testimony of Fred Stebler.)

justable toward and from the traveling belt; is that not so? A. That is so.

Q. And that is true as to the devices of the Strain Reissue Patent No. 12,297, is it not? A. Yes, sir.

The COURT.—What is the Strain Re-Issue—

Mr. ACKER.—Plaintiff's Exhibit No. 1.

The COURT.—Yes. If you call them Exhibit 1, and so forth, it will help out, I think.

Mr. ACKER.—All right, your Honor, I will do that.

Q. Now, the rollers of the device held to be an infringement in suit 2232 of the Complainant's Patent Exhibit 1 were not connected one to the other to rotate in unison; is that correct?

A. Just give me that again. [174]

(Last question read by the reporter.)

A. That suit 2232, I take it to mean this model we have before us, and that being the case, of course, the rollers are not connected or rotate in unison.

The COURT.—Read me that answer.

(Last answer read by the reporter.)

Q. (By Mr. ACKER.) And the rollers in the said models are mounted for adjustment and for rotation in the same manner as the rollers of the Strain Reissue Patent, Plaintiff's Exhibit No. 1; is that correct?

A. Well, I wouldn't say they are mounted in exactly the same manner, but similar.

Q. Substantially the same?

A. Substantially the same, you might say, yes.

Q. And to all intents and purposes now in the de-

(Testimony of Fred Stebler.)

vice of the defendants at present in controversy, the rotary wall member consists of a single rotating structure; that is, a structure rotated in unison by power applied to one end in contra-distinction to a rotary wall member composed of a series of independently mounted and independently rotary rollers; is that not correct? A. I think so.

Q. (By the COURT.) How do these things rotate in this model?

Mr. ACKER.—In this model, if your Honor please, the rollers are rotated by the frictional contact with the fruit. [175]

The COURT.—That is what I thought. Now, this machine is rotated by power?

Mr. ACKER.—This machine we have now, instead of having a series of rollers mounted independently, or guides or brackets, so they could be adjusted up and down, we have one roller.

The COURT.—That one roller is operated by power at the end?

Mr. ACKER.—At the feed end.

The COURT.—At the feed end. All right.

Mr. ACKER.—And rotate in unison there and is what we term a continuous roller.

Q. Did you have charge at any time of other machines installed by Mr. Parker for the defendants to the present suit?

A. No; I haven't charge of those.

Q. Well, did you at any time operate those machines during the run for the sizing of oranges?

A. I did not personally operate it; I saw them

(Testimony of Fred Stebler.)  
operated, if that is what you mean.

Q. And when was that?

A. When we were there in December.

Q. When we made the trip to Porterville with his Honor, Judge Trippet? A. Yes, sir.

Q. And at that time the machines were not in operation? [176]

A. They were in the Mid-California house.

Q. Yes; but not in the Porterville house?

A. They started and operated them for us, of course.

Q. Can you state the approximate length of the grader employed by the defendants?

A. By "grader" I suppose you mean that grade-way, the portion of the machine that constitutes the gradeway.

Q. I mean the length of the grader, the entire grader.

A. Well, only approximately; I have never measured them, and I should judge they are in the neighborhood of 35 or 40 feet long.

Q. And what is the length of the bins relative to the grader?

A. I should judge about three feet longer than the grader.

The COURT.—That is the alleged infringing device we are speaking about now?

Mr. ACKER.—This is the infringing device I am speaking about now.

The COURT.—The whole length of the grader would be measured by the length of the belt?

(Testimony of Fred Stebler.)

Mr. ACKER.—The whole length of the grader would be measured by the point where the fruit enters into the fruit runway until it leaves it; that is the grader.

Mr. LYON.—To the end of the runway would be the length of the grader. [177]

The COURT.—Well, I wanted to know. Do you call the grader going to the end of those rollers or the end of the belt where the fruit would finally fall off?

Mr. ACKER.—From the bearing of the rotating wall member to the opposite bearing.

The COURT.—That would be the width of it, wouldn't it?

Mr. ACKER.—No, sir; the length, if your Honor please.

Mr. LYON.—We disagree with him.

The COURT.—That would be from one end of the roller to the other? (Indicating on patent.)

Mr. ACKER.—Here. (Indicating.)

The COURT.—That is what you are asking about now?

Mr. ACKER.—Yes; but if your Honor please, the rotating member goes beyond about two or three feet, and that constitutes a part of this grader.

Mr. LYON.—Well, we don't agree to that.

The COURT.—Show me what you are talking about in this picture now.

Mr. ACKER.—Take Exhibit No. 4, that part here (indicating). Now, that constitutes a portion.

The COURT.—This here? (Indicating.)

(Testimony of Fred Stebler.)

Mr. ACKER.—Yes, sir.

The COURT.—And you are asking him now about this. The witness may not understand you.

Mr. ACKER.—That is a part of this rotating number. [178]

Mr. LYON.—We don't agree, your Honor, on that particular phase.

The COURT.—All right.

Q. (By Mr. ACKER.) Now, is it not a fact, Mr. Stebler, that in the defendants' machine the bins are coextensive in length with the length of the rotating wall member of the grader, and considering this portion here as a portion of the rotating wall member?

A. I shouldn't consider it so.

Q. You say it does not?

A. I should not consider it so.

Q. That is, you don't consider the bins are the same in length? A. No, sir.

Q. Now, in the grader of Defendants' Exhibit No. 2, which is the Stebler Patent No. 943,798, how does the length of the bins compare with the length of the grader? A. They are longer in that case.

Q. How much longer?

A. Oh, anywhere from five to fifteen feet.

Q. Well, what is the usual length, about fifteen feet?

The COURT.—This patent in this case requires the bins to be longer?

Mr. ACKER.—Yes; your Honor, that is the sole point in this patent, as we will show when we come to the defendant's proof. [179]

(Testimony of Fred Stebler.)

Mr. LYON.—That is one feature.

Mr. ACKER.—That is the only feature in that patent, according to the history in the Patent Office, as we will come to later.

Q. In the device disclosed by Complainant's Exhibit No. 2, the grader is a comparatively short grader, is it not?

A. Well, you might consider it so. I don't know as I should; we make a practice of making the grader shorter than the bins; no established rule in regard to that.

Q. What is the usual length and proportion of the grader relative to the length of the bins as installed by you, Mr. Stebler?

A. Well, with us, I suppose the most common difference in length there would be the bins probably 10 feet longer than the grader, or 12 feet.

Q. And how many grades or sizes of fruit are taken care of by the bins which are extended beyond the length of the grader member?

Q. (By the COURT.) Does that make any difference? The different size of the fruit and the length of the bin?

A. Why, yes; we vary the length of those bins; we find it desirable and sometimes quite necessary to vary the length of the bins, to change them.

Q. Well, the longer the bins are, do you get the greater number of sizes by reason of having the bins longer? [180]

A. Well, it is not so much that; we have a fixed number of sizes.

(Testimony of Fred Stebler.)

Q. Well, answer my question. Would that make a difference?

A. The difference comes in probably a little greater flexibility, possibly; not perhaps so much the greater number of sizes but greater room for the given sizes.

The COURT.—Proceed, Mr. Acker.

Q. (By Mr. ACKER.) My question was about how many bins were projected or extended beyond the discharge end of the grader?

A. Well, due to the fact that those partition boards are movable, there might be three or there might be four; there might be one or there might be two.

Q. As installed and used?

A. Well, it is installed and used with those partitions movable; each man places them where he wishes.

Q. And in the said devices, what is there that guides and directs the sized fruit from the grading member to those bins which are situated at a point removed from the end of the grader?

A. The belt and the guides thereon.

Q. By the guides, do you mean chutes?

A. Well, you might call them chutes; they are simply sticks, is all they are.

Q. Well, in your patent you term them chutes, do you not? A. Possibly. [181]

Q. And they constitute run-ways, do they not?

A. Yes, sir.

Q. And in those run-ways the fruit is carried or guided from the grader into the fruit receiving bins; is that not a fact? A. Yes, sir.

(Testimony of Fred Stebler.)

Q. And in conjunction with those chutes you employ a traveling belt for guiding the fruit relative to the sizes; is that not a fact?

A. Not so much guiding; simply belts for conveying.

Q. Well, the belt conveys the fruit against the wall surface of the inclined chutes, does it not?

A. No, sir; there is where you are mistaken.

Q. It does not? What does it do?

A. It carries it—the belt conveyor—is the carrier—is the conveyor.

Q. Well, the belt is arranged to travel longitudinally and parallel of the fruit grader, is it not?

A. Yes, sir.

Q. And these chutes are arranged transverse of the longitudinal traveling belt, and at an incline, are they not?

Q. Well, I don't know as I understand your terms; at least, I wouldn't use them that way. They are not exactly transverse; they are at an angle, of course, to the line of travel of the belt. [182]

Q. They are arranged at a transverse inclination to the travel of the belt?

A. Possibly that would express it.

Q. And they extend from the grading member to the bins or bin in which the fruit is to be received; is that not a fact? A. Yes, sir.

Q. Now, what would happen in your machines if all of the guide chutes were removed?

A. The fruit would mix.

Q. How? A. The fruit would mix, probably.

(Testimony of Fred Stebler.)

Q. Then you would not preserve the integrity of the sized fruit; is that correct?

A. Not with our present construction and the present adjustment of the bins.

Q. And so it is necessary that you use these chutes arranged at a transverse inclination to the longitudinally traveling belt in order to maintain the integrity of the sized fruit; is that right?

A. With our present method of construction.

[183]

Q. (By the COURT.) What do you mean by "present method of construction"?

A. Well, we have—I should say, the length of these bins varies in relation to the length of the grader, and there are instances where the distributing system was not much longer than the grader, in which event there was not much transverse motion to the guide-ways. In other words, the fruit run almost straight across the belt and dropped down in, except in cases of radical adjustment of the bins, or something like that.

Q. (By Mr. ACKER.) By your present construction, Mr. Stebler, you mean the construction which is illustrated and described in your letters patent Complainant's Exhibit Number 2?

A. That shows it, yes.

Q. And that is the construction you have reference to?

Q. (By the COURT.) Well, now, do you claim that you can construct this grader in a different man-

(Testimony of Fred Stebler.)

ner and comply with your patent, and let the fruit run off practically diagonally—I mean, practically at right angles with the rollers? A. Yes, sir.

Q. (By *the ACKER.*) And the fruit is delivered into the bins without the use of these guide chutes?

A. No; I didn't mean to say without the use of the guide chutes.

Q. You have to then employ the guide chutes in order to preserve the integrity of the sized fruit from its line [184] of travel from the grader into the bins?

A. When you vary the location of the bins you do; yes.

Q. And that is the purpose of those chutes?

A. Yes, sir.

Q. In your cross-examination you referred to a device which has been manufactured and sold by the Miller Manufacturing Company. That was not the device which is used by the defendants in the present action, was it?

A. Well, I don't recall referring to any devices manufactured by the Miller Manufacturing Company.

Q. Pardon me?

A. I don't recall referring to any devices manufactured by the Miller Manufacturing Company in my direct examination.

Q. Wasn't your attention directed to a suit which you had brought against the Miller Manufacturing Company? A. No, sir.

(Testimony of Fred Stebler.)

Q. What was the name of that company?

A. The Pioneer Fruit Company.

Q. That was the machine manufactured by Mr. Miller, was it not? A. I believe so.

Q. So you understood what I meant by my question, did you not?

A. I probably did, yet I couldn't answer that way.

Q. That device was a device, was it not, wherein the fruit runway consisted of two parallel members, one member [185] being a traveling member and the other being a rotary member, composed of a series of independently adjustable rollers?

A. Yes, sir.

Q. Very similar to the device which was held to be an infringement, and which had been manufactured and sold by Mr. Parker, is that correct?

A. Yes, sir.

Q. I understood you to testify that you had installed, and did install the first machine conforming to the device of Complainant's Exhibit Number 2, during the latter portion of the year 1907. Were any changes made in that machine after its installation? A. I don't think there were.

Q. Did you not shortly afterwards change the construction of that machine so that the smaller fruit was then discharged in a different position from which the fruit was discharged as originally installed? A. No, sir.

Q. And carried to bins situated at a different point? A. No, sir.

(Testimony of Fred Stebler.)

Q. The grader was not reversed? A. No, sir.

Q. And you are positive as to that?

A. Yes, sir.

Q. Where was that first machine installed? [186]

A. At Upland.

Q. What is the house?

A. The Mountain View Orange & Lemon Growers Association.

Q. You are positive that machine was not changed or altered so that the bins for the small sized fruit were projected beyond the feed end of the grader?

A. Not unless done within the last two or three months.

Q. Did you have any knowledge of fruit sizing and distributing apparatus prior to the year 1907, wherein the sized fruit was conveyed from the grader by means of downwardly transversely inclined chutes and the fruit from said chutes received into bins, the partitions of which were longitudinally adjustable?

Mr. LYON.—Just a minute. That is objected to as not cross-examination, and an obvious attempt to go into the defense of the case under the guise of cross-examination. The witness' testimony on direct has been limited to 1910, and if counsel desires to prove the prior state of the art, he must do so by his own witnesses.

Mr. ACKER.—This witness was placed on the stand as an expert in this art, and as an expert in this art I have a perfect right to inquire into his

(Testimony of Fred Stebler.)

knowledge of the art as it existed prior to the advent of the Stebler patent in suit.

The COURT.—It is kind of hard for me to determine whether this is cross-examination, or not.

[187]

Mr. ACKER.—There is great latitude permitted in any cross-examination of a witness.

The COURT.—Well, I know.

Mr. ACKER.—But when the witness appears as an expert in an art, as this witness has in reply to one of my objections, it was urged that he was an expert; I have a right to inquire into his expert knowledge.

The COURT.—Of course, if I knew the materiality of it it might throw a different light on it. You are asking now about his knowledge of the construction of the machine prior to the invention of this Exhibit 2 machine?

Mr. ACKER.—Yes, sir.

The COURT.—Cross-examination must be material and relevant to the issue.

Mr. ACKER.—It is certainly material to the issue as to whether or not distributing bins were formerly known to him as an expert, wherein the partitions were longitudinally adjustable to vary the size of the bins.

The COURT.—Mr. Acker, you withdraw that question and ask him smaller questions and shorter. It is hard for me to carry that long question, anyhow.

(Testimony of Fred Stebler.)

Mr. ACKER.—I will arrange it on my own.

The COURT.—Sir?

Mr. ACKER.—If the witness is unable to answer it, I will take care of that on my own case.

Referring to figure 1 of the drawings of Complainant's [188] Exhibit 2, the same being the Stebler patent, how many of the fruit receiving bins are illustrated therein as being extended beyond the fruit grader? A. Four.

Q. And the means illustrated for conveying the fruit from the grading elements to the bins consists of the transversely downwardly inclined guides 12 and 13,—marked by the reference numbers 12 and 13? A. Together with the belt; yes.

Q. Now, each guide strip of the strips forming the chutes is provided with a telescope end section, is it not? A. Yes, sir.

Q. And by means of that telescope end section you are enabled to lengthen out each guide strip, is that correct? A. That is a fact.

Q. And used for that purpose?

The COURT.—Is that part of this patent, exhibit 2?

Mr. ACKER.—Yes, sir.

Mr. LYON.—What was the question, Mr. Reporter?

(Last question read by the reporter.)

The COURT.—Is that telescopic feature part of exhibit 2 patent?

Mr. LYON.—Yes; it is a part of the patent, but all

(Testimony of Fred Stebler.)

claims are not limited to that feature; that is one of the features of the invention, but it is not included in any of the claims which we stand on in this case.

[189]

The COURT.—It is not involved in this suit?

Mr. LYON.—No.

Mr. ACKER.—What do you mean, it is not involved in this suit?

The COURT.—This telescopic feature of this thing is not involved in this suit.

Mr. ACKER.—I think, your Honor, before we finish with this case, it is involved in this suit, quite materially so, and it is a material part of the patent.

The COURT.—Well, I suppose that complainant in bringing this suit specified the claims of the patent on which he relies. It seems to me that it is a novel thing that the defendant raises an issue that plaintiff did not tender.

Mr. ACKER.—Well, if your Honor please, those are chutes.

The COURT.—Sir?

Mr. ACKER.—They are peculiar chutes in this patent, and the chutes form a portion of the claims.

The COURT.—All right; go ahead. We will see.

Q. (By Mr. ACKER.) You are the owner, I understand, Mr. Stebler, of the device covered by Complainant's Exhibit Number 3, the same being the Tom Strain patent? A. Yes, sir.

Q. Do you know whether a device was ever installed under the Tom Strain patent? A. Yes, sir.

(Testimony of Fred Stebler.)

Q. When and where? [190]

A. I don't know as I can tell you just when it was installed, but I saw it in use down at Tom Strain's packing-house at Fullerton some years ago.

Q. And how was that machine constructed?

A. Substantially as shown in the patent.

Q. Substantially as shown in the patent?

A. Yes.

Q. What means did it have for varying the grade outlets for the escape of the sized fruit?

A. It had both the adjustment of the rotating member and the adjustment for the opposing traveling belt.

Q. Well, you mean it had means for adjusting the belt from below? A. Yes, sir.

Q. And you are positive of that? A. Yes, sir.

Q. Examined it carefully?

The COURT.—Adjusting the belt below like this Porterville machine?

Mr. ACKER.—Yes, your Honor.

The COURT.—Pushing the belt up?

Mr. LYON.—Just a moment. If your Honor will pardon the interruption, if you will turn to figure 9. (Exhibiting patent to the Court and explaining the same.)

Q. (By Mr. ACKER.) And you are positive that means were incorporated in that machine for adjusting the belt from the [191] bottom?

A. Well, I recall that when Mr. Strain—Thomas

(Testimony of Fred Stebler.)

Strain himself showed me that machine he pointed that feature out to me.

Q. Mr. Thomas Strain, that is the Strain, the patentee of the letters patent? A. Yes, sir.

Q. Pointed out to you the adjusting means for raising and lowering the belt from underneath?

A. Yes, sir.

Q. And you examined it?

A. No; I didn't examine it minutely to corroborate him; I understood then he said he had this thing. I saw the boards were cut in two in sections, and of course I was not concerned enough about it then to get in and see whether what he was telling me was actually there.

Q. Then, as I understand from your testimony, you have no positive knowledge on that subject either one way or the other?

A. Nothing except what he told me himself.

Mr. ACKER.—I object to that as being merely hearsay evidence.

Q. If you have any knowledge on that subject, just state it, but I don't care to have you tell what Mr. Strain told you. My question is, do you, of your own knowledge, know what means were provided in that device, as installed, for [192] adjusting the belt from underneath?

A. The evidence was there, as far as I could see, without getting under the machine. I saw these leaves in sections. I didn't get under the machine to see whether there were means there for raising and lowering it.

(Testimony of Fred Stebler.)

Q. (By the COURT.) In the patent, exhibit 3, figure 9, number 16, is that supposed to be the thing that raised and lowered the—adjusted the belt?

A. Yes, sir.

The COURT.—Well, go ahead, Mr. Acker; excuse me.

Mr. ACKER.—That is all, Mr. Lyon.

Redirect Examination.

(By Mr. LYON.)

Q. What became of this Thomas Strain machine like Plaintiff's Exhibit 3; do you know, Mr. Stebler?

A. It was dismantled and put out of use.

Q. Do you know whether it was successful while it was in use?

A. Why, it appeared to be; he used it, I think, for two seasons.

Q. Do you know the circumstances under which it was dismantled?

A. Well, yes; about that time I successfully prosecuted a suit against certain other parties for the use of the adjustable roller, and on the successful termination of that [193] suit I went to Mr. Strain and told him I thought his machine was also an infringement, and asked if he would discontinue the use of it, or settle with me for it on the same basis that we settled the other, and I think that there was some correspondence passed both between myself and him in regard to it, and he finally discontinued the use of the machine, I think, practically on that account.

(Testimony of Fred Stebler.)

Q. Now, you have stated that in the suit number 2232 involving the Parker patent type of grader like the model which is here in the courtroom, the rollers in that are not power-driven. Referring to the so-called modified form of Parker machines which were considered by the Master, Lynn Helm, and whose report was affirmed by Judge Bledsoe, how were the rollers in those two types of modified machines arranged with respect to being driven?

A. They were power-driven in unison.

Q. Power-driven in unison, in substantially the same manner as the Porterville Citrus Association machine? A. Yes, sir.

Mr. LYON.—I think that is all right now.

Recross-examination.

(By Mr. ACKER.)

Q. In that modified type of the Parker machine which was held to be an infringement, how was the adjustment for varying the grade outlets of the fruit runway accomplished?

A. It was accomplished by varying the distance between [194] the roller and its opposing traveling conveyor.

Q. (By the COURT.) I can't understand you very well.

A. It was accomplished by varying the distance between the roller and the opposing traveling conveyor.

Q. (By Mr. ACKER.) Well, can't you be a little more explicit for the benefit of the Court and explain

(Testimony of Fred Stebler.)  
exactly how that was produced?

A. It was accomplished by adjusting the roller.

Q. That is, the roller was adjusted toward and from the traveling belt? A. Yes, sir.

Q. And by that you mean you varied the distance between the belt and the roller for making the change for the different size fruit? A. Yes, sir.

Q. And in the same manner as the rolls are adjusted in the model of case number 2232, that the rollers were adjusted toward and from the belt?

A. I shouldn't say in the same manner; the same process, you might say.

Q. (By the COURT.) What is there, a hinged joint between the spaces?

A. The rollers were connected with a flexible joint, yes.

Q. Now, on this machine here at Porterville where these arms were brought over and connected with the roller *to that* roller down, where the roller goes in here, is there a [195] hinge in here?

A. There is a simple flexible joint, as I understand it.

Q. You don't know about that?

A. As I said awhile ago on my direct examination, I didn't have the machine apart enough to explain definitely how they are constructed, but from what I could learn I assume it is a similar construction from what we had in these modified machines I was speaking about in the Riverside Heights Orange Growers Association.

(Testimony of Fred Stebler.)

Q. In order to adjust the roller there seems to be some sort of a joint?

A. It is just a short piece of square-shaped journaled in an end casting, which is fastened to each end of these rollers in such a fashion that would make it work.

The COURT.—That is what I would call a joint.

Mr. ACKER.—That is in the modified machine we referred to, and the Court held to be an infringement, the two rollers were connected with a flexible joint connection.

The COURT.—In this machine here, it seems to me there seems to be a bending of that shaft some place along here where it is fastened by these elbows.

Mr. ACKER.—It rotates in its bearings the same as any other shaft.

The COURT.—Then it must be in a straight line.

Mr. ACKER.—It is, substantially.

The COURT.—You claim this machine is in a straight line— [196] this shaft?

Mr. ACKER.—Yes; substantially a straight line; as I understand it.

Mr. LYON.—No; there is a universal joint end there.

Mr. ACKER.—Excuse me, there is not. Show it. It is in substantially a straight line.

The COURT.—If it was not in a straight line—

Mr. ACKER.—There is no torsion to it, if you mean that; there is no eccentric turn to it.

The COURT.—Well, it would flop—I don't know how to express it—if it were not turned straight this

(Testimony of Fred Stebler.)

way. If there was a bend in it. Suppose there was a bend in that pencil (indicating), then it would be turning around that way, and it wouldn't turn true.

Mr. ACKER.—This turns true.

The COURT.—That is what I want to know. You claim in this device it turns true all the way through.

Mr. ACKER.—Yes, your Honor.

Mr. LYON.—Are you through?

Mr. ACKER.—I am through.

#### Redirect Examination.

(By Mr. LYON.)

Q. Again referring to the so-called modified Parker machines considered in the accounting in case 1562, was the adjustment of the roller sections toward and away from the belt in those machines effected by moving the whole roller, [197] or just one end of the roller?

A. Well, the adjustment, of course, was what I suppose you term the end of the roller; that is, at this flexible joint, so when we adjusted the roller at this joint, it moved the ends of the two adjacent rollers to and from the belt, but those ends only, and of course, that diminished as it went to the other end.

Q. Now, one form of those modified graders had a cone-shaped roller, so that it was the small end of the roller which formed the particular outlet to be adjusted and the big end next to it the adjustment wouldn't affect? A. Yes, sir.

Q. And the other form had a straight roller with pieces of wood or filler sticks blocking out the non-

(Testimony of Fred Stebler.)

operative end, did they? A. Yes, sir.

Q. In the same manner as the filler sticks which are used in this Porterville machine?

A. Yes, sir.

Q. And those filler sticks are shown in this photograph, are they?

A. They show in one of the photographs, yes.

Mr. ACKER.—What?

Mr. LYON.—They show in one of the photographs.

Mr. ACKER.—What do you call the filler sticks in the photographs? [198]

Q. (By Mr. LYON.) I hand you five photographs and ask you to point out what you refer to as the filler sticks?

The COURT.—What is that?

The WITNESS.—On the photograph marked exhibit 7.

Mr. LYON.—The top view of the rollers.

The COURT.—7. What is it now on exhibit 7. That is an end view of the thing.

Mr. LYON.—It is a top view.

The COURT.—What is it you see on there?

A. Right at the bottom of the picture, with this side up, we see the inclined conveying belt, which is the opposing member to the roller; this is the conveyor belt. This, with the roller, constitutes the gradeway. Now, you will notice that directly under the enlarged portion of that roller, you will see a stick or a piece of wood practically filling up that aperture, which has the effect of, so to speak, still

(Testimony of Fred Stebler.)

further decreasing that portion of the aperture so fruit cannot get through.

Q. (By Mr. LYON.) And in the so-called modified Parker machines of the accounting, part of the roller was blocked out in this same general manner, in the same manner, so that the adjustment of the end of the roller which was blocked out didn't affect the change of grade when you adjusted the forward or grade-forming end?

A. It didn't affect the change of the grade on that particular portion of the gradeway. [199]

Q. And in that respect, to what degree or in what manner does the Porterville machine correspond or differ?

A. It does not differ at all; it is exactly the same.

Q. (By the COURT.) What is that?

A. It does not differ at all; in that respect, the Porterville machines do not differ.

Q. From what?

A. From these so-called modified machines.

Q. The one that was considered on taking an accounting in the other suit? A. Yes, sir.

Mr. LYON.—I think that is all.

#### Recross-examination.

(By Mr. ACKER.)

Q. Do you find, or did you find in the defendants' machine these so-called filler sticks which you testified were embodied and utilized in the Parker modified type of machine held to be an infringement?

A. Sure, they are there.

(Testimony of Fred Stebler.)

Q. Well, where do they appear, Mr. Stebler?

A. They appear in the machine just as they did in the photograph.

Q. In the Porterville machine being used at the present time these filler sticks are employed?

A. Yes, sir; I think you will find they are there.

Q. Did you find them there? [200]

A. I think so.

Q. Are you sure?

A. That is my recollection. [201]

Q. (By the COURT.) Now, in that picture No. 7, we had better mark that thing "A" so we will understand it, if that is going to be in controversy, the stick lying under the roller, mark it "A."

Q. (By Mr. ACKER.) Will you mark on the photograph what you have just referred to, Mr. Stebler, that part which you designate as a filler stick?

Mr. LYON.—He just has.

Mr. ACKER.—Where is it?

The COURT.—I think Mr. Lyon marked it on the exhibit, the one I understand you are talking about.

Q. (By Mr. ACKER.) Well, this part which you have marked "A" is what you term the filler stick on Exhibit 7? (Presenting photograph to witness.)

A. Yes, sir.

Q. (By the COURT.) Did you see this machine since we were up there?

A. Yes, sir; I saw it the first of May—the first week in May.

Q. (By Mr. ACKER.) When, if at any time, did

(Testimony of Fred Stebler.)

you compare the machines being used by the defendants with this photograph Exhibit No. 7?

A. When we were there in December.

Q. Does the fruit at any time come in contact with these so-called filler sticks which you have designated on the photograph print exhibit 7, by the reference letter "A"? [202]

A. I cannot say that I actually saw it come in contact with it, no.

Mr. ACKER.—That is all.

Mr. LYON.—That is all. Mr. Parker, take the stand a moment. [203]

**Testimony of George D. Parker, for Plaintiff  
(Recalled).**

GEORGE D. PARKER, recalled.

Direct Examination Resumed.

(By Mr. LYON.)

Q. Mr. Parker, you had a conversation with me in the packing-house of the Porterville Citrus Association at Porterville in regard to the machines which are here in issue, did you?

Q. (By the COURT.) Did you talk to Mr. Lyon when we were up there about these machines?

A. Yes.

Q. (By Mr. LYON.) You told me that the roller sections of the roller side were connected by a universal joint, didn't you?

A. Connected through the bearing with a piece of cold rolled square steel shafting to drive it through from one roller to the other.

(Testimony of George D. Parker.)

Q. Have you a patent which shows that action, that form of joint? A. Yes.

Q. Can you refer to it? I think I have it here. See if you have it there, Mr. Parker, to show that joint, that is all.

Mr. ACKER.—Are you referring to that patent you had this morning?

Mr. LYON.—Yes. Mr. Parker told me he had a patent which showed that joint, and I asked him to produce it now so the Court will know what that particular joint is. [204]

The COURT.—Now, let me see if I understand what you are talking about.

Q. I show you Plaintiff's Exhibit 4, and I designate a point on it which I call "A," that rod that runs from one end of that roller to the other. You notice I have designated point "A"? A. Yes.

Q. Now, is that rod solid at point "A," or has it a joint there? A. It has a joint.

Q. What kind of a joint is it? A. A bearing.

Q. A bearing. What do you mean "a bearing"?

A. I think the roller rotates.

Q. A bearing might rotate on the bearing. It would simply go round the shaft if it rotated on the bearing.

A. It simply went around the shaft.

Q. Now, is the shaft solid at that point?

A. There is no shaft running clear up through from one end to the other on that machine, but each wooden roller is connected one to the other by means

(Testimony of George D. Parker.)

of a piece of square cold rolled steel, which drives the rollers in unison.

Q. Now, this square steel has a bearing then on this arm that goes over and holds the roll?

A. No; the roll has the bearing; the piece of square steel has no bearing at all; it is only for driving one roll to the other. [205]

Q. Which is it has the bearing?

A. The rolls themselves.

Q. You mean these wooden pieces, they have?

A. It is a sectional roll already applied to this shaft here—

Q. Now, that shaft, I will call that "B."

A. Power is applied to shaft "B" and drives this roller.

Q. Roller "C."

A. And in turn the next roller.

Q. What connects roller "C" and roller "D" together?

A. A piece of square steel that drives through.

Q. Is that square steel solid from one roller to the other?

A. It runs through a hole in the bearing.

Q. It runs through a hole in the bearing? Let us call the bearing "F."

Mr. LYON.—The ends of these roller sections have a square hole in them, have they? A. Yes.

Q. And this square piece of steel is smaller than the square hole? A. Yes.

Q. So there can be a flexing of that piece of square

(Testimony of George D. Parker.)

steel and permit one of these rollers to be moved with relation to the other, and be moved with relation to each other? [206]

A. There is no section of the shaft.

The COURT.—I guess we will find out by and by.

Mr. LYON.—If you will answer the question.

Mr. ACKER.—I will have a sketch of that made for your Honor.

The COURT.—All right.

Mr. LYON.—We reserve the right to show the facts in connection with that joint, even if we close that. That is all, Mr. Parker, if you will produce that sketch. [207]

#### **Testimony of Arthur P. Knight, for Complainant.**

ARTHUR P. KNIGHT, a witness called in behalf of the complainant, being first duly sworn, testified as follows:

##### **Direct Examination.**

(By Mr. LYON.)

Q. Please state your name, age, residence and occupation.

A. Arthur P. Knight; Glendale; 51 years of age; patent attorney and expert.

Q. What experience and education have you had tending to familiarize yourself with mechanics and with patents and patent office drawings and specifications, and also with fruit graders and fruit distributing devices?

A. I was for three years and a half an assistant examiner in the United States Patent Office, in

(Testimony of Arthur P. Knight.)

which occupation I had to examine applications for patents and their drawings connected therewith, and since then, for the last—since 1889, I have been engaged almost continuously in the business of patent attorney and expert, in which business I have had to deal with the making of drawings and the reading of drawings and patent specifications. In regard to my experience as an expert in fruit graders, would say that I have testified in a number of cases along this line as an expert.

Q. Was one of those cases the case of Stebler against [208] the Riverside Heights Orange Growers Association and George D. Parker in regard to the Robert Strain patent and this Parker patent grader? A. Yes, sir.

Q. And during the course of that case did you have occasion on various occasions to examine fruit graders both in operation and while idle? A. Yes.

Q. Have you examined at any time the machines of the Porterville Citrus Association and of the Mid-California Citrus Association at Porterville?

A. Yes.

Q. For what purpose?

A. With a view to familiarize myself, as far as I could, with their construction and mode of operation.

Q. I show you five photographs and ask you if you know of what they were taken.

The COURT.—Are these the photographs of them?

(Testimony of Arthur P. Knight.)

Mr. LYON.—Yes; these are the photographs, Exhibits 4, 5, 6, 7 and 8.

A. These are the photographs of the machines referred to.

Q. Were you personally present during the taking of any of these five photographs?

A. I was in the building; I saw them being taken, although I did not help the photographer. [209].

Q. Under whose direction was the photograph, Plaintiff's Exhibit 7, taken?

A. Partly under my direction.

Q. For what purpose?

A. In order more particularly to show the construction of the—the form of the rollers.

Q. Calling your attention to the part marked "A" in designation, do you know what that refers to?

The COURT.—"A" on what exhibit?

Mr. LYON.—No. 7.

A. This part is a strip on the table which supports the traveling belts, and its primary function is to form the lower guide for the belt, but it also being directly beneath the enlarged portion of the roller, would act as a guard strip if there were any possibility of the fruit reaching it.

Q. Now, I call your attention, Mr. Knight, to Plaintiff's Exhibit No. 5, and particularly to the devices in that photograph shown as connected to the brackets which support the rollers. Please explain to us what these devices were at the time that you examined these machines.

The COURT.—What devices? What are you

(Testimony of Arthur P. Knight.)

talking about now? Mark them something.

Q. (By Mr. LYON.) On that photograph mark these with a figure 4.

A. The part you have marked 4 is a downwardly extending [210] rod or bolt, which is, as I recall it, connected to the slideable bracket member. In the installation at the time I saw it—

The COURT.—Bolt 4. All right. Go ahead.

A. —these bolts did not, as far as I could ascertain, serve any useful purpose, as the bracket was held by the bolts, shown on top of the “U-shaped” bracket.

Q. (By Mr. LYON.) You referred to the bolts that extend through the slots in the brackets?

A. Yes, sir.

Q. Now, Mr. Knight, are you familiar with Plaintiff's Exhibit No. 1; the Robert Strain Reissue?

A. Yes.

Q. Will you please compare the Porterville Citrus Association machines with the device illustrated and described in Plaintiff's Exhibit No. 1, particularly as to the gradeway and adjusting devices, eliminating the consideration of the question of the bins; [211] I add the last for the simple reason that there is one claim on the apron bins in Plaintiff's Exhibit Number 1 which is not involved in the litigation.

A. The Strain machine, as disclosed in Complainant's Exhibit “A”—

The COURT.—Exhibit 1.

A. —comprises a plurality of rollers or roller sections mounted end to end, and a traveling conveyor

(Testimony of Arthur P. Knight.)

which extends alongside of these roller or roller sections so that a fruit grading runway is provided between the traveling conveyor and the roller or roller sections, and the roller or roller sections are mounted so as to be independently adjustable toward or from the traveling conveyor to vary the width of the opening through which the fruit passes in being graded.

The COURT.—Now, Mr. Lyon, is he doing anything more than is printed on that patent?

Mr. LYON.—Why, nothing more, except I don't want him to go into detail on that, but just compare that actually with these other—

The COURT.—I know, but he is proceeding to tell us what is in this patent 1—Exhibit 1. Now, it seems to me from my experience in these cases, I don't want these experts to tell me what is in those patents. It seems to me I can see it myself.

Q. (By Mr. LYON.) Then, in view of the remarks of the court, [212] confine your answer to comparing the devices of the defendants' machine with what is disclosed in this patent.

Q. (By the COURT.) What is in this Porterville thing that is like that?

A. In reference to the support—the mounting and adjustment of the rollers.

Q. Now, go on. I don't care anything about the mounting and adjustment of the rollers. Where is that particular photograph—

A. The point of similarity between Complainants' Exhibit Number 1 and the Porterville construction is the mounting of the rollers as indicated at 5.

(Testimony of Arthur P. Knight.)

Q. What exhibit have you got now?

A. Exhibit Number 5.

Q. Exhibit Number 5. Now, designate it by a letter. A. "D."

Q. All right. Is that that "U" bracket, as it has been called?

A. Yes; this bracket being slidably mounted on a support and fastened by bolts which pass through a groove in the bracket.

Q. Now, where is that in exhibit—that thing. What is like that in Exhibit 1?

A. In Exhibit 1 the corresponding part is—

Q. Let's see. What figure are you looking at?

A. Figure 1; it is shown in both figures. [213]

Q. Figure 1. What letter?

A. Adjusting arms—N—capital N.

Q. What is that?

A. Adjusting arms, N, sliding in guide locks Q, and adjusted by adjusting that S on P.

Q. (By Mr. LYON.) Then the parts that you have last referred to are the parts which support the ends of the rollers in both devices?

A. Yes.

Q. Now, proceed with your comparison. How do the rollers, so far as affecting the forms of a grading opening in defendants' device, as illustrated by the photograph, Plaintiff's Exhibit 5, correspond with the grade rollers of Plaintiff's Exhibit 1?

A. They correspond, except that in Defendants' Exhibit 5 these rollers—

(Testimony of Arthur P. Knight.)

Q. (By the COURT.) Plaintiff's Exhibit 5, you mean?

A. Plaintiff's Exhibit 5, these rollers—

Q. What rollers are you talking about now? You have got 5 before you?

A. They are not very well shown in 5.

The COURT.—No.

Mr. LYON.—Take one of the other exhibits in which they are shown better.

Q. (By the COURT.) Now, in Exhibit 4 I have got the rollers marked C and D on mine. Have you got Exhibit 4 there? [214] Here is 4. Now, let's see. I mark this guide arm, and that shaft there is B, and this is C and this is D (indicating on photograph).

A. In complainant's Exhibit Number 4 the rollers marked C and D are made of two different diameters, the smaller diameter portion forming the grade opening, and the larger diameter portion forming the idle portion over which the fruit must run in passing through the next grading opening. Another difference between these rollers and the Strain—and Complainant's Exhibit 1, as far as mounting goes, is that they are mounted so that the adjacent ends of two rollers—of two adjacent rollers move together, so as to be simultaneously adjusted by the supporting bracket, while in Complainant's Exhibit 1, the adjustment at the junction between the rollers—at the point between the rollers is independent for the two rollers. These differences of construction do not affect or change the mode of operation of the rol-

(Testimony of Arthur P. Knight.)

lers, as fruit grading elements or in regard to the adjustment—the effect of the adjustment.

Q. (By Mr. LYON.) You were familiar, were you, with the so-called modified Parker machines in case 1562, as considered by Mr. Lynn Helm, Special Master?

A. I will have to ask where that machine was.

Q. In the Riverside Heights Orange Growers' Association. A. Yes.

Q. And examined those machines in connection with [215] counsel and Mr. Lynn Helm?

A. Yes.

Q. And gave testimony in regard to them?

A. Yes.

Q. Now, in regard to the rollers of the Porterville Citrus Association machines, and these modified Parker machines, so-called, were there any material differences so far as functions or mode of operation in forming individually adjustable grading openings is concerned, over or different from those of those modified Parker machines?

A. No; no essential difference; there was a difference in construction.

Q. You mean in details of construction?

A. Yes.

Q. Are you familiar with Plaintiff's Exhibit 2, the Stebler distributing apparatus (handing paper to witness)? A. Yes.

Q. Will you point out what similarities exist in the mode of operation, association of elements, and the interrelation of elements in the defendants' ma-

(Testimony of Arthur P. Knight.)

chines at Porterville and the apparatus illustrated and described in Plaintiffs' Exhibit Number 2?

A. In the Porterville—

Q. (By the COURT.) Now, what are you looking at?

A. Number 4. In the Porterville machine, Exhibit Number 4, the series of rollers C, D and so forth, and the belt, which [216] is indicated by the letter E—

Q. Let's see. What is the belt there?

(Witness indicates.)

Q. That is this belt here under B?

A. Yes; formed the grader corresponding to the grader or grading element—

Q. Now, look at the drawing, figure 1, and tell me what it is.

A. Consisting of the grading rope 4.

Q. Now, let's see, 4 in figure what?

A. Figure 2.

Q. Figure 2. A. Also figures 1 and 2.

Q. Now, let's see. I haven't located 4 yet.

(Witness indicates.)

Q. Oh, yes, 4 in 1. Let's see where it is.

(Witness indicates.)

Q. Yes; I see it.

A. And the grading roller 5, figure 3.

Q. Figure 3, Exhibit 5. All right. There are four of those ropes in figure 3; are they number 4 also? A. Yes.

Q. All right; go ahead.

A. The Porterville machine, Exhibit 4, has a trav-

(Testimony of Arthur P. Knight.)  
eling conveyor which I will letter F.

Q. Point it out to me. [217]

(Witness indicates.)

Q. That is F, is it? A. Yes.

Q. All right; go ahead. Well, you have already got an F. A. No; the other was E.

Q. All right. A. And a traveling conveyor G.

Q. Point that out in the picture.

A. Right here (indicating) on the other side looking through the opening.

Q. Through the opening?

A. Yes; on the other side.

Q. All right.

A. I will mark these bolts F and G, also on Exhibit 7.

Q. Go ahead. Where do you find that one?

A. These correspond to the traveling conveyor or belt 10.

Q. In figure what? A. In figure 1.

Q. Of the R. Strain. A. The Stebler patent.

Q. All right. Figure 1 in the Stebler patent. Number what now?

A. Number 10; also showing figure 3.

Q. 10 in figure 3.

A. In figures 1 and 3.

Q. Yes; all right; go ahead. [218]

A. Porterville machine has guards or deflectors shown in exhibit 5 at H.

Q. Well, there are several arranged differently there.

A. Arranged differently. As constructed, these

(Testimony of Arthur P. Knight.)

deflectors in the Porterville machine can be arranged straightaway as shown by the ones on the right of exhibit 5, or they can be placed diagonally or obliquely, as shown by the ones on the left of figure 5.

Q. Shown in the left of the photograph?

A. Yes; exhibit 5. In the Porterville machine there are a number of bins with adjustable partitions shown at—I should say, indicated at I, which can be moved along so as to adjust the positions and sizes of the bins. This corresponds to the adjustable partitions 17 shown in figures 1 and 3 of Complainant's Exhibit 2. [219]

Q. (By Mr. LYON.) How do these devices which you have pointed out as being similar to the Porterville machines of the defendant correspond in their mode of operation and functions with the corresponding devices which you have pointed out—

The COURT.—Now, just wait a minute. Before you get away from that figure 17, No. 17, figures 1 and 2, are you right about that? Figures 12, isn't it, No. 12?

A. The specification says a series of movable partitions 17.

Mr. LYON.—12 are the guides, your Honor.

The COURT.—Sir?

Mr. LYON.—12 are the guides; 17 are the partitions.

The COURT.—Oh, yes; I understand. Go ahead.

Q. (By Mr. LYON.) How do the functions and mode of operation differ in relation to these parts which you have compared, compared with each other

(Testimony of Arthur P. Knight.)

in the device of Plaintiff's Exhibit 2, and in the Defendants' Porterville machine?

A. The general inter-relation of parts is the same.

Q. Do you find in the Porterville machines the adjustable bin partitions having relation to the adjustability of the deflectors or guides?

A. Yes.

Q. And you find the inclined distributing carrier belt extending longitudinally of the machine?

A. Yes. [220]

Q. And do you find that the distributing belt and the bin space are the same, or less or greater longitudinal extension than the grading element in Defendants' machines at Porterville?

A. The belt and the bin space are of greater longitudinal extension. I would explain this by calling attention to exhibits 4 and 5.

The COURT.—Well, I am inclined to take a recess now. We will adjourn court now until 10 o'clock tomorrow morning.

(Whereupon, at the hour of 4:15 P. M., an adjournment was taken until Wednesday, July 12, 1916, at 10 o'clock A. M.) [221]

*In the District Court of the United States, for the  
Southern District of California, Southern Division,  
Ninth Circuit.*

Hon. OSCAR A. TRIPPET, Judge Presiding.

A-44—EQUITY.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

A-45—EQUITY.

FRED STEBLER,

Plaintiff,

vs.

MID-CALIFORNIA CITRUS ASSOCIATION,  
Defendant.

A-50—EQUITY.

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

Filed Aug. 8, 1916. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [222]

Los Angeles, Cal., Wednesday, July 12, 1916,

10 A. M.

The COURT.—Stebler vs. Porterville Citrus Association.

ARTHUR P. KNIGHT, recalled.

Direct Examination Resumed.

(By Mr. LYON.)

Q. Just before adjournment last night, Mr. Knight, you were asked whether the distributing belt and the bin spaces in the defendants' machines at Porterville were of the same or less or greater longitudinal extension than the grading element in said machines, and had stated that the bin spaces were of greater longitudinal extension than the grading element, and had stated that you would explain this by calling attention to Plaintiff's Exhibits 4 and 5. Please proceed.

A. From Exhibit 5 it is apparent that the length of the bin space at the tail end of the machine extends to the driving mechanism, whereas from Exhibit 4 it is seen that there is a portion of the shaft between the end roller and the driving mechanism so that the length of the grader element would be at least this much less than the length of the bins; furthermore, the larger portion of the last roller is an idle space, so that the last grading opening is that much farther from the end of the machine, making the total length of the bin space several feet longer than the length of the grader element.

Q. You have referred to certain chute forming means or [224] deflector bars in defendants' machines at Porterville. Please explain how those are constructed, and how they are arranged in said machines, and to what part or parts they correspond in Plaintiff's Exhibit No. 2 in function and mode of

(Testimony of Arthur P. Knight.)

operation and inter-relation of parts, if at all.

(Handing copy of patent to the witness.)

A. The function of these—

Q. (By the COURT.) What is the technical name of those things, if they have a name?

A. Guide means, it is called in the patent.

Q. Guide means?

A. That is what they are called.

Q. (By Mr. ACKER.) Aren't they in the patent called chutes?

A. They are also called chutes, but in the first reference to them called guide means.

Q. (By the COURT.) What are they called in the Stebler patent?

Mr. ACKER.—Chutes, if your Honor please; they are referred to as chutes.

Mr. LYON.—Mr. Knight says they are first referred to as guide means, and they are also referred to as deflectors, and they are also referred to as chutes, the three terms meaning the same thing. The first reference is on page 2 of the specification, column 2, about line 121. Your Honor has that patent before you. [225]

The COURT.—That is Exhibit 1?

Mr. LYON.—That is Exhibit 2.

The WITNESS.—Also on line 971.

Mr. ACKER.—Well, that is the part he refers to as guide means 12 and 13.

A. Yes.

Q. And those guide means as disclosed in the patent, consisting of two members, form the chute or

(Testimony of Arthur P. Knight.)

runway; is that correct? A. Yes.

Q. So when you say the guide means, you mean the parts 12 and 13?

A. That is right. In connection with the conveyor, they constitute the machine.

Q. (By the COURT.) They constitute the machine, those two members, 12 and 13? Now, we understand it. 12 and 13 are the sides of the chutes.

Mr. ACKER.—12 and 13, if your Honor please, constitute two inclined members that are arranged transversely of the carrier belt, and form a chute or runway in which the fruit is carried from the grading element into the bin.

Q. (By Mr. LYON.) In that connection I will ask you this question, Mr. Knight, by way of further interruption. In the devices of the Stebler patent, Plaintiff's Exhibit 2, what function has the upper one of the two deflectors 7 and 13 with reference to the lower one, 12, as to any fruit which is carried between the two deflectors? Referring, for instance, [226] to figure 1.

Mr. ACKER.—Now, if your Honor please, I submit that the patent is the best evidence as to what the function of those parts is, and it calls for no explanation on the part of this witness, unless it must be the same function as given in the patent itself, and that is contained in the descriptive matter of the patent.

The COURT.—It seems to me that is right, Mr. Lyon.

Mr. LYON.—Well, counsel has made a statement

(Testimony of Arthur P. Knight.)

that is confusing there, and if there is any doubt in the mind of the Court, I would like to have this witness state, because he says he is familiar with the operation of both machines. I don't want to lead him, but I know what his answer will be and that is that the upper one of those has no function, whatever, in regard to the lower one.

Mr. ACKER.—Now, if your Honor please, I submit that counsel has answered his own question for the benefit of this witness, and the document itself speaks on that point and it requires no expert testimony.

The COURT.—Where is it in the document?

Mr. ACKER.—It is in the document, and when we come to the argument we will show that the file references in this case give no other construction except what is shown.

Mr. LYON.—I am perfectly familiar with the file.

Mr. ACKER.—We will come to the file reference in due time. [227]

Q. (By Mr. LYON.) Change the form of the question, Mr. Knight, then, simply and solely in this way. You have stated that you have observed machines embodying this Stebler invention of Plaintiff's Exhibit No. 2 in actual operation. Explain to us the function of the relative guiding means.

Mr. ACKER.—If your Honor please, I make the same objection. The patent itself is the evidence on that point and it requires no expert testimony from this witness.

The COURT.—Well, I believe there is a rule that

(Testimony of Arthur P. Knight.)

the mechanics, and so forth, can explain the mechanism so that the Court can understand what the patent is and apply it to the mechanism. This question would involve that phase of it.

Mr. ACKER.—Under that phase, an expert is entitled to tell the Court what any one part or more parts of the device is, but not as to the operation of those parts; that is, as to the patent itself.

The COURT.—Before we get away from that. I have been looking at this figure 1 in the patent, you call those things 12 and 13, form the sides of the chutes. Now, if I understand this drawing, 12 is also part of the telescope and 13 is the upper part of the telescope.

Mr. ACKER.—No, your Honor.

Mr. LYON.—That is correct.

Mr. ACKER.—Excuse me, Mr. Lyon. If your Honor please, 12 and 13 do not constitute the same piece. [228]

Mr. LYON.—Yes, they do.

Mr. ACKER.—One minute. 12 and 13—11 is the telescopic end of 12 and 13. 12 and 13 at its end each has a telescopic section, and that telescopic member is 11; 12 and 13 form the chute.

The COURT.—Well, just come up here, Mr. Acker.

(Informal discussion at the bench.)

Mr. LYON.—There is no doubt, of course, in regard to this showing, or anything else, the Court is entitled to hear the expert testimony. No expert testimony is binding on the Court; it is simply advisory.

(Testimony of Arthur P. Knight.)

The COURT.—I will overrule the objection and hear what the witness has to say about it.

The WITNESS.—The question, as I understand it, is as to the mode of operation of these members that form the side walls.

Q. (By Mr. LYON.) And what they are.

A. They are formed by the two telescopic members, which, as in lines 126 and 127 of the patent, are described in such a way that the member section 12 slides within section 13.

Q. (By the COURT.) Line 126?

A. To 127.

Mr. LYON.—Page 2.

Mr. ACKER.—I wish to state, your Honor, I was incorrect, that 12 is the sliding member of 13; I was incorrect in my statement, but the drawing was so confusing there as to the [229] reference of those numerals.

Q. (By Mr. LYON.) Then, Mr. Knight, proceed to tell us the construction of the defendants' machine, so far as it has any guiding means corresponding in function, in whole or in part, with these guiding means of the Plaintiff's Exhibit 2, pointing out its mechanical construction, and what differences in construction and mode of operation and inter-relation of parts there are.

A. These parts are indicated at H on Exhibit 5, and also marked as H on Exhibit 8.

Q. (By the COURT.) What is that?

A. Exhibit 8.

The COURT.—Now, wait a minute. I want to

(Testimony of Arthur P. Knight.)

keep my copy marked up with you.

Mr. LYON.—We have only one copy of the Exhibit 8, Judge.

The COURT.—All right. (Examining exhibit.) Well, that is the guide. What about that?

A. The function of these guides or deflectors, or guards, is to change the course of travel of the fruit, as it is carried downwardly and forwardly by the incline conveyor belt. In saying "forwardly," this applies to only one or more of the belts in the defendants' machines, as one or more of the belts have a reverse motion, but the effect is the same, that these guards or guides control the point at which the fruit leaves the traveling conveyor by preventing it from running straight down to the bins. The [230] object of this operation is two-fold. In the first place, it insures the carrying forward of the fruit to a greater distance longitudinally than the length of the grader element thereby contributing to one of the important features of the Stebler, machine, namely, the provision for a greater longitudinal extension of the bins than of the grader element. Another function of these guides or deflectors is associated with their adjustability. These guides or deflectors are fastened to the bed, which supports the conveyor belts by bolts which are secured in longitudinal slots in the bed so that these guides may be moved along to any desired longitudinal position. By doing this, the fruit may be discharged at any desired point of the

(Testimony of Arthur P. Knight.)

bin length from any one of the adjacent—from the adjacent grader opening. This contributes to the effectiveness of the adjustability of the bin partitions, since without this adjustment of the guides, it would be of little use to have the bin partitions adjustable. In other words, when the fruit is running to certain grades in excess, the corresponding bins will be enlarged by proper adjustment of the partitions, and these guides or deflectors will be correspondingly adjusted to guide the fruit from the corresponding grade opening to that bin at the proper portion thereof. In both of these respects the function and mode of operation of these guides is equivalent to that of the Stebler machine. The specific construction of the guides is different, and the [231] manner in which they are adjusted is different, but the result is the same as regards the objects aimed at, namely, the delivery of the fruit to adjustable points in the bin length, and the carrying forward of the fruit to a greater longitudinal extension than the grader element itself.

Q. (By Mr. LYON.) Referring now to Plaintiff's Exhibit No. 1, the Robert Strain Patent, in that patent, how is the rope belt mounted?

A. It is mounted on—

Mr. ACKER.—If your Honor please, I believe the patents are the best evidence to tell how that rope is mounted.

The COURT.—It seems so to me. Of course, I recognize the fact that when this testimony is taken before a Commissioner it is necessary to go

(Testimony of Arthur P. Knight.)

into those details, but I don't think it is necessary before a court. I think Mr. Lyon can tell from a patent what about it; if there is any application to mechanics, why, I would be glad to hear any expert on it.

Mr. ACKER.—I have no desire to interpose an objection to anything in the trial of the case. I want everything to go before the court, even things that may not appear relevant, but when it comes to the construction of the patent itself, that is for the patent to speak. The courts have ruled on that repeatedly.

Mr. LYON.—That is not true to that extent, but it may be that it is clear how this belt is supported in this particular [232] question.

Now, Mr. Knight, in the defendants' machines at Porterville, how are the grading belts supported in that machine?

A. They are supported in guides on the table these guides having wall portions, which engage the edges of the belt and confine them laterally, forming grooved guides for the belt.

Q. And do such grooved guides correspond in function and effect to the grooved guide of the Plaintiff's Exhibit No. 1?

Mr. ACKER.—That question is objected to as immaterial, irrelevant and incompetent.

The COURT.—I will overrule the objection.

Mr. ACKER.—Exception.

A. They do.

Q. (By the COURT.) Now, what is this grooved

(Testimony of Arthur P. Knight.)

guide in 1? I never saw that machine. What letter is it?

A. I' and I. You will find a reference to it in line 40 of page 1.

Q. Now, that I seems to be the space between those two ropes, and I' seems to be the rope.

A. Well, that is simply an unfortunate letter. By referring to line 40 of page 1—

Q. Line what?

A. Line 40 of page 1, I is the guide and I' is the groove. That means, your Honor, that the rope forms one [233] side of the fruit bin.

Q. Guide I, according to that language, seems to form one side of it.

Mr. ACKER.—The guide I, if your Honor please, constitutes one side of the fruit runway, and the H is the rope that propels the fruit through the runway.

Mr. LYON.—We disagree absolutely on that proposition. That is why I asked him. The fruit never touches on anything except the rope or belt in that device.

The COURT.—Where is the belt?

Mr. LYON.—The belt is the round rope H.

The COURT.—H?

Mr. LYON.—Yes; and the grooved guide is the semi-circular groove that is in the wooden piece that supports the belt.

The COURT.—I' and H refer in this drawing to the same thing; that is I' there by H.

(Testimony of Arthur P. Knight.)

Mr. LYON.—Well, the I' refers to the groove in which H is supposed to be running—

The COURT.—And H is the rope

Mr. LYON.—H is the rope belt.

The COURT.—What is I?

Mr. LYON.—I is the wooden piece which forms the partition in which the groove I' is made.

Mr. ACKER.—There is a long wooden block that fills up that space between the two ropes. The letter I is on [234] that block.

The COURT.—Go ahead.

Q. (By Mr. LYON.) Now, then, how does this grooved guide in which the belts in defendants' machine are supported and run, correspond, so far as all the functions are concerned, with this grooved guide in Plaintiff's Exhibit 1?

A. Corresponds exactly.

Q. Do you remember the grooved guide in the so-called Parker Patent Device of the suit 1562, and in the modified machines?

A. That is the Riverside Heights?

Q. Yes.

A. I couldn't remember the details without refreshing my memory.

Q. This grooved guide you refer to in defendant's machine runs longitudinally of the machine with the longitudinal grading belt, does it? A. Yes.

Q. And state whether or not it is arranged parallel with the plane which passes vertically and longitudinally through the center of the roller.

A. It is.

(Testimony of Arthur P. Knight.)

Q. Have you examined and are you familiar with Plaintiff's Exhibit No. 3, the Thomas Strain Patent? (Handing copy of the patent to the witness.) A. Yes.

Q. When you examined the defendants' machines at Porterville, [235] did you make any sketches of the adjusting means which were under the grading belt? A. I did.

Q. Have you such sketches?

A. Yes. (Producing sketch.)

Q. Does this sketch truthfully represent one of such grading means as to construction and operation? A. So far as a sketch of that nature can.

Q. And it was made by you on November 12th, 1915, at Porterville? A. Yes, sir.

Q. Taking this sketch in connection with the photographic exhibits, will you please compare the defendants' machines with the disclosure of Plaintiff's Exhibit 3, giving your attention first to the grading machine proper as a device for separating the fruit in accordance with its sizes, and afterwards in regard to any features of similarity there may be as regards the belt or distributing system.

A. In this sketch the part marked "X" is a plate, which extends below the belt in an opening in the bed on which the belt runs. This plate is adjusted by a screw or bolt marked "Y," so as to raise or lower the belts, and adjust its distance from the roller marked "Z." This adjusting means is directly beneath the smaller portion marked "Z'" of the roller, so that this adjusted portion of the belt,

(Testimony of Arthur P. Knight.)

together with the smaller portion of the roller, form the grade opening [236] and this adjustment provides for adjusting the width of the grade opening. This is equivalent to the construction in exhibit 3 consisting of the inclined leaves referred to as hinged leaves in 13, as shown in figure 8.

Q. (By the COURT.) Where is that?

A. (Indicating to the Court.) In figure 7 of exhibit 3.

Q. I don't understand it. What is there in this drawing that is like this that raises the belt up?

A. The wedges shown in figure 9 at—

Q. Oh, this wedge thing?

A. The wedge, yes. It raises the hinged leaf.

Q. Oh, yes. I know what you are talking about now.

A. So as to adjust or vary the distance between the belt runing on the hinged leaf and the rotating rod 20.

Q. (By Mr. LYON.) There are hinges at 14 of figure 7, so that you can raise the belt towards or drop it away from the rod or roller. Proceed, Mr. Knight.

A. The construction of this is different from that of the Porterville machine, in that the adjustable support for the belt is hinged, and its height is adjustable by a wedge, instead of being grooved directly up and down by a bolt as in the Porterville machine, but its effect upon the belt is just the same, and its effect on controling the size of the grading

(Testimony of Arthur P. Knight.)

opening is just the same. In respect, therefore, to the mode of operation of the machine as a grader, this part is the equivalent. In regard to the—Would your Honor [237] mind if the question is read, it is so long ago?

Mr. LYON.—Read the question.

(Question referred to read by the reporter as follows: "Q. Taking this sketch in connection with the photographic exhibits, will you please compare the defendants' machines with the disclosure of Plaintiff's Exhibit 3, giving your attention first to the grading machine proper as a device for separating the fruit in accordance with its sizes, and afterwards in regard to any features of similarity there may be as regards the belt or distributing system?"")

A. Comparing the guides or deflectors in the Porterville machine, as shown at H in Exhibit 5 with the so-called guards indicated at 36 in figure 1 and 11 of Exhibit 3, the function of these guards is to deflect the fruit and cause it to leave the conveyor at a definite point so that it will be discharged into the bin at the proper point, and in this respect this function of the guards in the Plaintiff's Exhibit 3 is performed by the guards H, Exhibit 5, it being understood that these guards 36—

Q. (By the COURT.) Where? Point it out.

A. Right here. (Indicating to the Court.)

Q. Oh, yes.

A. —do not have the longitudinal adjustability which is common to the Porterville machine, Ex-

(Testimony of Arthur P. Knight.)

hibit 5, to Exhibit 3, but in so far as they form a definite control of the path of the fruit from each grader opening to a definite [238] part of the corresponding bin, they perform the function of Exhibit 3.

Q. (By Mr. LYON.) Do they perform that function in a different or substantially the same manner as the deflectors or guards of Exhibit 3?

A. In my opinion, they perform the function in substantially the same manner for the reason while these two parallel opposite portions of the guard 36 in Exhibit 3 are connected by an oblique portion, yet the same effect is produced by the two parallel opposite guard members shown at H at the right-hand side of Exhibit 5, these guard members overlapping, so that when the fruit runs past the end of the upper guard member, gravity will carry it down against the lower guard member, and it will then run along the same for discharge into the bin at a definite point.

Q. Then, if I understand you correctly, Mr. Knight, in regard to this Plaintiff's Exhibit 3, you will find in the defendants' machines at Porterville, as in Plaintiff's Exhibit 3, two different means by which the grade openings may be adjusted; first, the one by adjusting the grading rollers or rod with respect to the belt, and the other by adjusting the belt with respect to the portion of the rod or roller; is that correct? A. That is correct.

Q. (By the COURT.) Well now, this roller, as

(Testimony of Arthur P. Knight.)

I understand it, the defendant claims that roller is inadjustable [239] in the machine as it stands.

Mr. ACKER.—That is correct.

Q. (By the COURT.) Did you see it after they fastened those rods—those belts?

A. The machine was not in operation when I was there.

Q. (By Mr. ACKER.) Is all of your testimony, Mr. Knight, regarding the defendants' machine, based on an observation of the machine when it was not installed and not in an operating condition? A. It was installed but not operating.

Q. Was it installed in an operating condition? Was it fixed as it was finally ready for operation?

Mr. LYON.—That is objected to.

The COURT.—I think you had better wait for the cross-examination.

Mr. ACKER.—If the machine was not in an operating condition, I object to this witness testifying about it.

The COURT.—That will only go to the weight of his testimony.

Q. (By Mr. LYON.) Mr. Knight, I will ask you, in that connection, so far as these so-called deflectors are concerned,—state whether or not they have any fixed position or relation in those machines, or are they adjusted apparently at the will of the operator?

Mr. ACKER.—If your Honor please, I object to this question. This witness has not displayed any familiarity [240] with this machine in operation.

(Testimony of Arthur P. Knight.)

The COURT.—I overrule the objection.

Mr. ACKER.—Exception.

A. While I did not see the machine in operation, it was sufficiently complete to enable anyone, calling myself an expert, to see how it would operate, and I am sure I know how it was intended to work, and its mode of operation.

(By Mr. LYON.)

Q. Now, answer the last question.

A. The deflectors or guide members are provided with means for mounting them in any position along the conveyor belts so that they have no fixed definite position.

Q. Assume now, Mr. Knight, that after you had seen these defendants' machines, the tops of the bolts holding the brackets for the roller section had been driven down or riveted, what have you to say in regard to such riveting causing an absolute fixture of those adjustments in place?

A. It would be an easy matter with a good sized monkey wrench to turn the nuts back slightly so as to enable the upper bracket member to be slid up or down on the support so as to adjust the roller.

Q. Is that a common or uncommon way of locking a nut upon a bolt so that the rattle of the machine will not loosen it, and yet effect a ready adjustment of it when required?

A. It is not uncommon. [241]

Q. Basing your answer upon your experience with machinery, and particularly your observation of the defendants' graders and the other graders

(Testimony of Arthur P. Knight.)

with which you say you are familiar, can you give us any other purpose than for the purpose or adjusting the rollers with respect to the belt for the use of this slot and bolt adjustment connection of the brackets for holding the rolls in the defendants' machine?

Mr. ACKER.—That question is objected to, if your Honor please. It is leading in the extreme.

The COURT.—I don't understand it. Read the question.

(Last question read by the reporter.)

Mr. LYON.—In other words, is there any other reason that he can give why that was provided in that machine, basing his answer on his mechanical experience?

The COURT.—As I understand it, you want to find out—Let us mark these bolts on this—take Exhibit 4.

Mr. LYON.—Mark the bolts referred to—

The WITNESS.—These are marked D in Exhibit 5.

Q. The bolts referred to are marked D in Exhibit 5.

The COURT.—They are much plainer on that 4.

Mr. LYON.—Mark them D on 4 also, Mr. Knight.

The COURT.—There is already a D on 4.

Mr. LYON.—Make it a Z; we have no Z, anyway.

The WITNESS.—I have got a Z, too. [242]

Q. You have? A. Not on these.

Q. There is no Z on 4?

The COURT.—Call it D'; that will be all right.

(Testimony of Arthur P. Knight.)

Mr. LYON.—All right; D'.

Q. (By the COURT.) Now, there are two bolts on each of those arms there called D', both of them; you have got it on 4, have you? A. Yes, sir.

Q. These bolts here? (Indicating on the diagram.) A. Yes, sir.

The COURT.—All right, now; go ahead. What you want to know, is there any other purpose for those bolts in those slots with the exception of adjusting the size of the roller?

Q. (By Mr. LYON.) The roller towards and away from the belt. Answer the question.

A. I cannot conceive of any other purpose or function.

Q. Mr. Knight, with respect to the rollers or the roller in this device, did you observe whether or not the rod or shaft was continuous throughout the length of the roller side of the machine, or what the connection was between the rollers?

A. I was not able to examine the connection itself.

Q. To what extent did you observe the relation of each roller section to the other in that respect?

A. I saw that they were mounted end to end, and as far [243] as I could determine, they were connected to rotate in unison. I saw one of the rollers separately, and it had in connection with it a socket such as would be used for rotation.

The COURT.—Is there going to be any controversy about it?

Mr. LYON.—Not if the Court understands.

(Testimony of Arthur P. Knight.)

The COURT.—Mr. Acker said he was going to furnish us a drawing of those connections.

Mr. ACKER.—I will furnish you a drawing, your Honor.

Mr. LYON.—All right. We will close the direct examination of the witness on that. You may inquire, Mr. Acker.

Cross-examination.

(By Mr. ACKER.)

Q. Mr. Knight, having reference to Complainant's Exhibit I, the Robert Strain Re-issue Patent, is it not a fact that each sizing roller of said machine is mounted in independent brackets; that is, a bracket at each end, and which brackets are adjustable transversely of the machine to vary the position of the sizing roll relative to the traveling rope or conveyor of the runway? A. Yes.

Q. How many rolls of that type, each mounted in bearings of its own, or embodied in the grader of said letters patent, as you are familiar with the same and have seen it [244] in operation?

A. 9 or 10 rollers, as I remember it.

Q. And any roller of the series of rollers is adjustable toward and from the movable member of the fruit runway and independent of any other roller of the series? That is correct? A. Yes, sir.

Q. Was your comparison of the defendants' machine with the invention of the Strain Re-issue Patent based on the assumption that the sizing sections of the rotatable wall member of the fruit runway of

(Testimony of Arthur P. Knight.)

the defendants' machine were adjustable toward and from the traveling member of the fruit runway?

A. Read the question.

(Last question read by the reporter.)

Q. And the adjustment of one section being independent of any adjustment of another section.

A. My observation was based on the mode of operation of these parts, which, with the construction of the Porterville machine, produces the same result as the independent adjustment in Exhibit 1.

Q. My question was, Mr. Knight, whether your testimony was based on the assumption that those roller sections were adjustable toward and from the traveling member of the fruit runway?

A. Yes. [245]

Q. (By the COURT.) That is to say, you have assumed—and take Exhibit 4—you have assumed that C and D were adjustable to and from E?

A. Yes, if you mean by E the belt on this side. Unfortunately, the member E refers to the belt on the opposite side to the roller marked C.

Q. (By Mr. ACKER.) And equally so, your testimony was based on the assumption that those roller sections of the rotary wall member of defendants machine were adjustable toward and from the carrier member of the fruit runway for varying any grade outlet, or a given number of grade outlets for the fruit during the operation of the machine; is that correct? A. Yes.

Q. Directing your attention, Mr. Knight, to Com-

(Testimony of Arthur P. Knight.)

plainant's Exhibit 3, the Thomas Strain Patent, I will ask you to explain how the fruit passing beneath the grading rod moves or travels toward the fruit receiving bins.

A. Immediately after passing between the grading rod 20—

Q. (By the COURT.) Point it out.

A. (Indicating to the Court.) —the nearest portion of the carrier belt of the conveyor it encounters the upper member 36 of the guard, and is carried along the guard by the motion of the conveyor belt, and runs down onto the lower portion of the guard 36, and into a depressed portion 19 on the belt. It runs along this depressed portion [246] until it strikes an adjustable deflector shown at 36-B in figure 11, which deflects it off of the belt into the bin.

Q. (By Mr. ACKER.) Well, does the fruit after passing beneath the grading rod flow or move across the conveyor belt by gravity toward the fruit receiving bins?

A. Its motion transverse or towards the bin is by gravity.

Q. And what purpose does the member 36 serve relative to the transverse movement of the fruit in its flow towards the bins?

Q. (By the COURT.) Point it out. [247]

A. (Indicating to the Court.) It forces the fruit to move longitudinally and it keeps it from transverse movement until it passes the upper member 36, and then from its transverse movement until it

(Testimony of Arthur P. Knight.)

reaches the lower part of the member 36.

Q. (By Mr. ACKER.) And the part 36 then serves as a longitudinally disposed barrier for arresting the transverse movement of the fruit as it flows from the grading rod toward the fruit receiving bin, is that correct? A. Yes.

Q. And to that extent it serves the same purpose, does it not, as the barrier employed in the defendants' device for arresting the line of travel of the fruit flowing by gravity from the sizing member towards the fruit receiving bin?

A. Yes.

Q. Now, what purpose does the part marked 36-B in the device of the Thomas Strain patent of Defendants' Exhibit Number 3 serve?

A. It determines the particular point at which the fruit will be deflected from the depression in the conveyor and discharge into the bin.

Q. That member 36-B is longitudinally adjustable relative to the longitudinal traveling carrier member, is it not, Mr. Knight? A. Yes.

Q. And what is the purpose or what function is performed by the member 36-B of the said Thomas Strain patent? [248]

A. The purpose or function of this is to discharge the fruit into the bin at a given point so as to distribute the fruit uniformly throughout the bin, the idea being that if the fruit is allowed to run into the bin from the grader at different points along the bin there will not be an equal distribution.

(Testimony of Arthur P. Knight.)

Q. In other words, the member 36-B, which is longitudinally adjustable in the Tom Strain device in the Complainant's Exhibit 3 is employed for the purpose of regulating the discharge point of the fruit relative to the bin, and permits such regulation at the will of the operators?

A. Yes; but with respect to a single bin only, it does not provide for adjustment of the discharge relatively to the bin length as a whole, and therefore, it has no relation to the adjustment of the bin walls.

Q. It regulates the point of discharge for the sized fruit at any point desired respective to the bin and irrespective to the length of the bin, is that not correct?

A. Well, the bins are definite lengths, so I don't understand your question.

Q. Irrespective, Mr. Knight, as to any particular bin, or whether the bin is of a definite length, it would regulate and permits regulation relative to the point of discharge of the sized fruit to the bin which is to receive the fruit, does it not?

Mr. LYON.—That question is objected to as confusing and [249] involved and indefinite.

The COURT.—I don't think so; the objection is overruled.

Mr. LYON.—He says without regard to a bin, and then he says in the tail end something with regard to a bin.

The COURT.—Objection overruled.

(Testimony of Arthur P. Knight.)

A. If I understand the question, my answer would be that this deflector determines and controls the point of discharge of the fruit into the corresponding bin with respect to the length of the bin.

Q. (By Mr. ACKER.) Irrespective of the length of the bin.

A. No; I would say with respect to the length of the bin.

Q. All right. I will accept your qualification. If the bin is 6 feet wide or long, the longitudinally adjustable deflector, as you term it, 36-B permits the operator to vary or regulate the point of discharge of the fruit at any point within the sphere of the length of that bin, does it not?

A. Provided it was made of sufficient length, yes.

Q. What do you mean by "sufficient length," Mr. Knight?

A. Well, from your question I assumed that you meant if they enlarged the bins it would still provide for discharging to any point on that bin.

Q. No; my question was as to the bin irrespective of size, it would control the point of discharge to a 3-foot bin, and equally so to a 6-foot bin respectively, would they not?

A. If the machine was built that way; yes.

Q. (By the COURT.) That is to make the box fill up the same [250] depth all the way along?

Mr. ACKER.—That is to get the uniform distribution of the fruit within the bins, is it not?

A. That is not the idea set forth in this patent.

(Testimony of Arthur P. Knight.)

The idea is to discharge at one point so that all fruit will have an equal start in the bin and will go through one point, and all the packers working on that bin will be working on the same size fruit. Otherwise, if they allowed the fruit to come from the grader to the bin, there might be a little—there might be fruit coming from so much a smaller opening, or larger opening, or with this inclined construction that he has on his grading rod, there would be a little tendency in variation in the fruit along the bin. This is to equalize; it is an equalizer for the fruit that goes to any one bin, so it is uniform along the bin.

Q. (By the COURT.) You mean the same sizes of fruit?

A. Yes; but, of course, there is variation.

Q. Then that don't control the way the fruit lies in the bottom of the box at all?

A. It will tend to make a cone-shaped deposit in the box because it will all come out from that one point and spread from that like a cone.

Q. And then it don't spread it along the bottom of the box? A. No; it does not.

Q. (By Mr. ACKER.) It is your understanding that the part 36-B of the said Thomas Strain patent does not permit the [251] operator to regulate the distribution of the fruit evenly throughout the bin without reference to the patent, Mr. Knight, is that your understanding?

A. That was not the understanding of that de-

(Testimony of Arthur P. Knight.)

deflector, nor is not the mode of operation.

Q. (By the COURT.) In this Tom Strain patent then, all the fruit drops into the bin at the same place all the time? A. Yes.

Q. (By Mr. ACKER.) Now, that is your understanding of the Tom Strain patent, Mr. Knight?

A. Yes.

Q. Well, what interpretation or construction would you place upon this language of the patent, reading now between lines 74, page 2, of the specification, and having reference to the deflector 36-B, which is longitudinally adjustable. (Reading:) "This allows the fruit to be delivered into the bin in such a way that it is thoroughly mixed. If the fruit were delivered into the bins direct from under the grading rods, the size of the fruit in the bin at one extreme side would be larger than the size at the other side. To obviate this difficulty I employ the guards 36 and the deflectors 36-B, by means of which the fruit is thoroughly mixed in the bins, and no particular size occupies a particular place in the bin, as would be the case if the guard and deflectors were not employed."

A. I place on that the exact construction which I gave. [252]

Q. (By Mr. LYON.) And what was that, Mr. Knight? Explain it right there.

A. That by causing all the fruit from any one grading opening to be discharged into the bin at the same place, why then, as the fruit goes from that

(Testimony of Arthur P. Knight.)

place into the bin, into different parts of the bin, it would produce a uniform mixture for each packer working at that bin to operate on.

Q. (By the COURT.) Then in that event there would be no deflectors at all in that; there would not be any deflectors used at all where the fruit all runs into the same place in the box, would there be?

A. The idea, as I take it, is this: That the grading opening, in order to have any reasonable capacity, must be of some considerable length, so to get part of a foot or so. In that length as the fruit rolls over there will be a tendency, even in the smaller adjustment, of a grader in which, say, for the smaller sizes in that grade to pass through first, and the larger sizes will squeeze through before they get to the end of the opening. Now, if you don't have a deflector, the ones that went through first go to the first part of the bin—

Q. They all go to the same place, like a funnel?

A. Like a funnel, exactly.

Q. (By Mr. LYON.) Clear the rest of that up, Mr. Knight. Don't the parts 36 block out also the same as the filler sticks part of the portion between the grade rod and the belt so [253] as to prevent discharge except where it is up? Pardon the interruption, I just want to get the whole thing together there.

Mr. ACKER.—The patent is very clear on that, Mr. Lyon.

(Testimony of Arthur P. Knight.)

The COURT.—We will take a recess until half-past eleven.

(Recess.)

Q. (By Mr. ACKER.) What is the character of the grading rod designated by the reference numeral 20 in the device of the Tom Strain patent, plaintiff's exhibit number 3? (Handing copy of the patent to the witness.)

A. They are slender and flexible and rotating.

Q. It is a long, slender, flexible rod, is it not?

A. Yes.

Q. Have you any idea as to the diameter of the said rod? A. No.

Q. You never saw one of these machines in operation, did you, Mr. Knight? A. No.

Q. And that rod is of such a character that at points throughout its length it may be flexed toward or from the conveyor belt to vary the distance therefrom to secure variations in the grade outlets for fruit to be sized, is that correct? A. Yes.

Q. And how is it flexed?

A. By means of the supporting arms shown at 21.

[254]

Q. (By the COURT.) Point it out.

A. (Indicating to the Court.) 21 in figure 9, which are mounted pivots 22; between the uprights, so as the friction will engage the uprights and hold the rod in any position to which it may be kept.

Q. (By Mr. ACKER.) Are the bins of the said Tom Strain patent projected beyond the grader

(Testimony of Arthur P. Knight.)

member of the apparatus, or the grading point of the fruit?

The COURT.—The discharge point would be a proper thing.

Mr. ACKER.—I accept that, your Honor; I think that is a very good designation, the discharge point.

A. I do not see that they are.

Q. I understand from your direct examination that the means disclosed in the Tom Strain patent, Plaintiff's Exhibit Number 3, for raising and lowering the conveyor belt at points throughout its length of travel comprised a hinged plate or member 12?

A. Yes.

Q. And you expressed the opinion that the device employed in the defendants' machine for raising and lowering the belt at points throughout its length of travel was the equivalent of the hinged leaf 12, is that correct?

A. The hinged leaf 12, and its adjusting means.

Q. Is it your opinion as an expert that any means for raising and lowering the conveyor belt to vary the distance between the upper surface of the said belt and the rotating [255] member of the grade runway constitutes a mechanical equivalency of the hinged adjustable leaf member of the said Tom Strain patent.

The COURT.—Read that question.

(Last question read by the reporter.)

A. Yes; provided it was assembled in a machine in such manner as to produce the same result.

Q. The result of adjusting a traveling carrying

(Testimony of Arthur P. Knight.)

member and fruit grader with respect to the rotary member—with respect to the opposing member of the said fruit runway, would be to vary the distance and to regulate the grade outlet ways for sized fruit, would it not? A. Yes.

Q. You were present throughout the testimony given by Mr. Fred Stebler, the complainant, herein were you not, Mr. Knight? A. Yes, sir.

Q. And you heard the testimony of Mr. Stebler with reference to a so-called filler stick employed in the defendants' machine, and I believe you have referred to the exhibit so-called filler stick in your direct examination. Please explain the purpose and function of the said so-called filler stick as disclosed by the photographic exhibits which you have referred to in giving your testimony.

The COURT.—That is A in 7.

A. This part A serves as a guide for the lower edge of the belt, which is shown directly below in 7.  
[256]

Q. That would be the upper edge of the belt, wouldn't it?

A. Lower edge. This is looking down; it is cut away or not present at the grade opening, so that it forms an additional barrier for that portion of the roller which is between the grader opening and the other end of the roller. The enlargement of this other portion of the roller and the presence of this part A, both operate to reduce the space through which the fruit could pass. Whether or not the fruit would actually touch this strip depends on how

(Testimony of Arthur P. Knight.)

small it is and how far it can work under the roller.

Q. (By Mr. ACKER.) Is it your opinion that those so-called filler sticks in any manner control the flow or travel of fruit?

A. They might in some cases if a very small orange were running along the runway, it might work under the roller sufficiently to be arrested by this part A.

Q. Did you ever observe a machine in operation where the so-called filler stick served any such function? A. I have seen machines, yes.

Q. I mean used by these defendants. A. No.

Q. What is the length and approximate height of those so-called filler sticks?

A. I should say they were between one-half and three-quarters inches high, to the best of my recollection; as to the length they are substantially the same length as the [257] larger portion of the roller.

Q. Now, is it not a fact, Mr. Knight, that the only purpose served and the only function for what you have termed a filler stick in defendants' device is to support the belt relative to the inclined bed over which it travels, and prevent a downward slippage of the belt?

A. I cannot say that would be the only function, because I can see that the other might take place.

Q. What induced you in giving your testimony to designate that member as a filler stick?

A. I don't think I did in my testimony.

Q. In the case of Stebler versus Parker and Riverside Heights, number 2232, throughout your testi-

(Testimony of Arthur P. Knight.)

mony you referred to filler sticks that were employed in that device, did you not?

A. That was one name used; they were generally called overlapping arms.

Q. And what you meant by filler sticks as employed in that case was a form of member which closed a passage that otherwise would exist and permit the outflow of the fruit, but by being embodied in the machine, caused the fruit to travel in conjunction with the belt from one independently adjustable roller to within the sphere of an adjacent adjustable roller, is that not a fact?

A. In that machine, yes.

Q. And it was in that sense that you used the term in [258] that case, "filler stick," was it not?

A. In that case.

Q. To block out an opening? A. Yes.

Q. Now, do I understand you to testify that those so-called filler sticks appearing in those photographs were introduced in that machine of the defendants or those machines of the defendants for carrying fruit from one grading section of the rotary wall member to another grading section?

A. I do not say that they were introduced for that purpose, but I do say that they may serve that purpose in some cases.

Q. At what distances are those so-called filler sticks in the defendants' machines located relative to the rotary wall member of the grade runway?

A. They were quite close as shown in exhibit 7; I don't remember the exact distance.

(Testimony of Arthur P. Knight.)

Q. Well, is there any distance disclosed by those photographic exhibits?

A. No; you cannot measure it because it is a perspective view.

Q. I understand you to testify that you were present when those photographs were taken?

A. I was there, yes.

Q. You testified that you examined the machine, and you were familiar with it?

A. Certainly. [259]

Q. Aren't you able then from that examination and your so alleged familiarity with that machine, able to state as to the distance at which those so-called filler sticks were placed relative to the rotary wall member, and more particularly with reference to the sizing sections of the said rotary wall member of the fruit runway?

A. No; I didn't measure the distances and I can only say it was quite a small distance. [260]

Q. What would happen to the endless traveling belt of the defendants' machine if those so-called filler sticks were not employed? A. It would sag.

Q. That is, it would sag down the incline bed?

A. Yes.

Q. And destroy the effectiveness of the belt as a means for correctly carrying the fruit; is that correct? A. Certainly.

Q. Now, questions have been asked you and in your answers are you not satisfied in your own mind, Mr. Knight, that the only purpose for which those so-called filler sticks are employed in the defendants'

(Testimony of Arthur P. Knight.)

machine is to uphold that belt and prevent the downward sag of it?

A. I am satisfied that that was the purpose for which they were introduced, but I am equally well satisfied they may serve another function, perhaps unintentionally.

Q. That is, they may serve another purpose if the rotary wall member of the fruit runway is of such a construction as will permit fruit to pass beneath the said rolls at points where it is not designed to pass as sized fruit; is that what you mean? A. Yes.

Q. So in the present case you have not employed the term "filler stick," in connection with the defendants' [261] machine in the same sense in which you employed the term "filler stick" in connection with equity suit No. 2232, and as exemplified by the model on the desk before you, as was introduced as an exhibit in said case; is that correct?

A. Not exactly in the same sense; it was more in the sense of a member where there was a filler stick extending along the side of the roll, as I remember.

Q. And if your memory is correct, is it not a fact that you testified that so-called filler stick in the modified Parker Machine served the purpose of bridging over so to speak, a certain space, and to aid in carrying the fruit from one section of the rotary wall member to another section, which would be a sizing section?

A. No; as I remember it in the case I have in mind, my memory may be at fault, the filler stick in the modification was for blocking out a portion of the

(Testimony of Arthur P. Knight.)

roller length equivalent to the formation of the conical roller in another modification.

Q. In other words, you used the term "filler stick" in connection with the so-called modified machine in the same sense in which you used the term "filler stick" in connection with the suit in equity 2232?

A. In an equivalent sense, yes.

Q. I called your attention in that modified type of machine, it was incorporated therein by the maker thereof to [262] serve the same purpose as the so-called filler stick in equity suit 2232; is that not correct?

A. An equivalent purpose, yes.

Q. Now, Mr. Knight, when were you present for the first time in the packing-house of the defendants to the present action for the purpose of an inspection of a machine or machines?

A. November 12, 1915.

Q. That is the time these photographs were taken that have been introduced in evidence, and which you have testified to? A. Some of them at least.

Q. Were they not all taken at that time? I so understood your testimony to be.

A. No; my testimony was that I was assisted in the making of one of these photographs, and I was present in the building during the time the photographs were being taken. Now, as to what the photographer did, I cannot swear.

Q. Were the machines and the associated parts in the same condition at the time you visited or entered

(Testimony of Arthur P. Knight.)

the factories, as they were in at the time those photographs were taken?

Mr. LYON.—Read me that question.

(Last question read by the reporter.)

Mr. LYON.—That question is objected to as involved; I do not quite understand it myself. [263]

Q. (By Mr. ACKER.) Is there anything about that question you do not understand, Mr. Knight?

Mr. LYON.—Necessarily he don't know anything except what the figures show about the condition of the machines; when the photographs were taken, he was not there. Now, if it means the second time, I don't understand the question myself.

Mr. ACKER.—I asked on his first visit, and I am asking about that now.

Mr. LYON.—Not this question.

The COURT.—Objection overruled.

Q. (By Mr. ACKER.) If there is any question I ask you, Mr. Knight, that there is the slightest doubt in your mind as to my meaning, or as to the meaning of the question, please advise me so I can correct it.  
[264]

A. I can only say that the construction as shown by these photographs is the construction that I saw there, but as to whether all the parts—some of these parts are movable, whether they all occupied the same position when the photographer took the picture, I cannot say.

Q. Did you see the machines in operations?

A. I did not.

Q. Were they installed for operation at the time of

(Testimony of Arthur P. Knight.)

your visit? A. I think one of them was.

Q. Which one?

A. It was, as I remember it, one of the Porterville machines looked to me like it was ready.

Q. That is, it had the appearance to your eye of being ready? A. Yes.

Q. But as to whether that machine was completely installed and in condition for operation, you are unable at this time to state? A. I can't say.

Q. When did you next visit the packing-houses of the defendants wherein these machines were involved? A. I do not recall any other visit.

Q. Then you only made the one visit and not two visits as intimated by counsel during his interruption to my question. There was only one visit made by you? [265]

A. We went there twice during the same day.

Q. Yes. You made two trips to the packing-houses in the one day, and that was November 12th?

A. Yes.

Q. Now, in the defendants' machine how does the sized fruit move from the fruit grader member to the fruit receiving bins?

A. It goes down on the incline bed, and at the same time is carried along by the belt and is obstructed by the guide, so that it is finally delivered to the bin at a point determined by the position of these guides.

Q. That is, it flows downwardly and in a transverse direction relative to the grader element by gravity? A. Yes.

(Testimony of Arthur P. Knight.)

Q. And in its course of travel traverses the surface of the longitudinally traveling carrier and is arrested in its line of travel by a longitudinally disposed barrier, is it not?

A. I wouldn't say it traverses the surface of the carrier; it is carried along with the carrier to the barrier you speak of.

Q. You say it does not traverse the surface of the carrier? A. It travels with the carrier.

Q. Well, what is the width of the carrier?

A. I couldn't give you the exact dimensions; it is several feet, including all of the belts. [266]

Q. Several feet in width?

A. Including all of the belts.

Q. How many belts are there?

A. Well, as I remember it, in the Porterville machine there was a central belt, and then that was in the middle; then one next to that, and then a lower one, which was the lower run of the cull belt.

Q. What was the direction of travel of the several belts with respect to each other?

A. The middle belt, as I remember it, moved in the direction of the grader belt. The next belt—

Q. (By the COURT.) That don't mean anything to me, moved in the direction of the grader belt.

A. In the same direction as the grader belt.

Q. Oh, in the same direction? A. Yes.

Q. Then it moved toward the lower end of the grader? A. Yes.

Q. Now, that is the belts between the rollers?

(Testimony of Arthur P. Knight.)

A. That is the belt between the rollers.

Q. How many belts between the rollers?

A. Well, I don't understand the question, your Honor.

Q. How many belts between the rollers on the side of the machine?

A. Well, there was only one grader belt, and then below that on the table, and the other bed, there were two belts [267] for distribution.

Q. This one belt that run down between the rolls?

A. By rolls, do you mean grading rollers?

Q. Yes.

A. Just one belt below the grading rollers.

Q. Sir?

A. Just one belt below the grading rollers.

Q. No; between them, I am asking.

A. Yes; one belt between the two grading rollers on opposite sides.

Q. And that ran towards the lower end of the grader, and the direction of that belt was towards the lower end of the grader? A. Yes.

Q. Now, on which side of the machine, or the position outside of the roller, how many belt were there?

A. In the Porterville there was two belts, each side of this central belt.

Q. Two belts on the outside of the roller?

A. Well, as a matter of fact, the middle one of those belts was directly beneath the table that carried the grader belt; directly beneath the rollers, therefore.

(Testimony of Arthur P. Knight.)

Q. In what direction did it run?

A. That belt ran in the opposite direction; that is, in fact, the lower run of the grader belt, therefore traveling in the opposite direction. The outer belt, the lowermost [268] belt, the lower run of the cull belt, that followed in the same direction as the grader belt.

Q. (By Mr. ACKER.) Then the belts interposed between the outlets of the grader element and the longitudinally disposed bin traveled in reverse directions; is that correct?

A. One of them traveled in a reverse direction to the other two.

The COURT.—We will take a recess until 2 o'clock.

Whereupon a recess was taken until 2 o'clock P. M.  
[269]

AFTERNOON SESSION—2 o'clock P. M.

ARTHUR P. KNIGHT, recalled.

Cross-examination resumed.

(By Mr. ACKER.)

Q. I understood you to testify on direct examination, Mr. Knight, that the member of the Thomas Strain Patent, Complainant's Exhibit No. 3, designated by the reference numeral 36, corresponded in function to the longitudinally adjustable barrier incorporated in the defendants' machines, and in order that there may be no misunderstanding relative to that feature of the Thomas Strain Patent, Complainant's Exhibit No. 3, I will ask you to explain for

(Testimony of Arthur P. Knight.)

the benefit of the Court the action which takes place on the Thomas Strain device when the sized fruit leaves the grade aperture of the runway and the part 36, which I referred to appearing more clearly in figure 11 of the drawing, sheet 1, and also in figure 6, sheet 2 of the drawings of the Thomas Strain Patent.

A. As I said before, the fruit immediately on passing the grading rod 20 encounters the guard 36 and rolls along the guard until it reaches the inclined portion thereof, and then passes to the lower member of the guard, which delivers it to the depressed portion 19 of the belt; it travels along this depressed portions until it is ejected from the belt by the deflector 36-B on the next succeeding [270] guard. I may say, however, in this connection, that the upper guard member 36 is so closed to the grading rod that in effect it forms a barrier practically at the grading rod, so it is not apparent, for example, in referring to figure 9, how an orange large enough or small enough to just pass through between the grading rod and the belt could actually pass this grading opening until it passes beyond the end of this guard member.

Q. Now, as I understand from your testimony, the upper longitudinal extension of the member 36 is situated adjacent to the grading rod in such a manner as to prevent fruit escaping from beneath the grading rod until it reaches the downwardly inclined portion of the said member 36; is that correct?

A. I should say so, on referring to figure 9.

Q. And when the fruit is discharged from beneath

(Testimony of Arthur P. Knight.)

the grading rod, and at a point beyond the sphere of the upper longitudinal extension of the member 36, does it roll by gravity transversely of the carrier belt until it reaches the lower longitudinal extension portion of the said member 36? A. Yes.

Q. Now, when it reaches the lower longitudinal extension of the said member 36, the fruit, as I understand, is carried along by the longitudinally moving carrier? A. Yes. [271]

Q. Now, when it reaches the end—the outer end—of the lower longitudinally disposed section of the member 36, does the fruit then leave the said member and roll by gravity into the bin arranged alongside thereof to receive such sized fruit?

A. No; I take it that it does not actually move until it strikes the deflector 36-B.

Q. Then it is propelled longitudinally by the belt at that time resting in the trough-shaped edge of the belt formed by the trough-shaped end in the lower portion of the downwardly inclined table; is that correct? A. Yes.

Q. Now, it would remain on that belt and not to be removed therefrom by gravity or otherwise until it was carried over the extreme edge of the conveyor belt, if it were not for the deflecting member 36-B; is that correct?

A. That is the way the operation was described.

Q. How?

A. That is the way the operation was described.

Q. Now, in defendants' device the fruit first leaves

(Testimony of Arthur P. Knight.)

the grading member, rolls by gravity transverse to the longitudinally traveling belt until its movement by gravity is arrested by the longitudinally disposed barrier; is that not correct? A. Yes. [272]

Q. Then, as I understand, the fruit is carried by the longitudinally traveling carrier resting against the barrier until it reaches the terminal portion of that barrier, and then rolls by gravity into the bin?

A. Correct.

Q. That is correct? A. Yes.

Q. Now, what induced you to say that the function of the member 36 in the Tom Strain Patent was the same as that of the longitudinally disposed barrier of the defendants' device? [273]

A. I think that I was correct in that statement. The function is the same, as far as that operation of the barrier goes, having left the barrier, the function of the barrier is completed. Then it remains to get the fruit off the belt. In the Porterville apparatus that is done by gravity alone. In the Exhibit 3 it is done by positive ejection by the inclined deflector.

Q. Now, as I understand from your testimony given in response to a recent question, the member 36 of the Tom Strain patent, Complainant's Exhibit 3, acts first as a filler for the grading aperture, and thence its second function is to serve as a barrier and prevent the fruit from going into the bin?

A. At that point, yes.

Q. At any point?

(Testimony of Arthur P. Knight.)

A. As long as the fruit is in contact with it.

Q. And when the fruit is out of contact with the said barrier, it is still prevented by the **construction** of the Strain device from going into the bin until it reaches another member, which positively forces it off; is that correct? A. True.

Q. (By the COURT.) Now, let me ask a question. I don't know whether I understand it or not. In this belt, the belt is flat and is not at angles like this belt here (indicating). The carrier belt is flat. is it? [274] A. In the Porterville.

Q. In this Strain patent, Exhibit 2?

A. The belt is inclined, but it is flat, except for that concavity down at 19, shown in figure 7—figure 9 on the last page.

Q. (By Mr. ACKER.) So the member 36 of the said Tom Strain patent prevents the fruit from going into the bin, which it otherwise would do, and roll therein by gravity, and the carrier belt, by reason of its troughed construction at the outer edge thereof, then receives the fruit and prevents it flowing into the bin until it has been mechanically ejected therefrom; is that correct? A. Yes.

Q. Now, in the Parker device, the fruit, the moment it leaves the end of the barrier—longitudinally disposed barrier—rolls by gravity into the bins automatically, does it not? A. Yes.

Q. There is no means employed to eject it off of the carrier belt? A. Except by gravity.

The COURT.—Now, I want to tell you as we go

(Testimony of Arthur P. Knight.)

along, I don't understand this. I never saw one of them, and I don't understand the drawings.

Mr. ACKER.—If your Honor will turn to figure 9 of the drawings, you will notice that the carrier belt 10 at its [275] lower edge is troughed longitudinally, due to the troughed construction of the lower edge of the inclined table over which it travels. Now, the result is that when the fruit leaves this member 36, instead of rolling by gravity into the bin placed to receive it, it rests in the troughed-shaped—

The COURT.—Come up here, Mr. Acker. You are talking about this. Where is figure 9?

Mr. ACKER.—Figure 9 is on sheet 3.

(Informal discussion at the bench.)

Mr. ACKER.—Now, in the defendants' device, as I understand, the moment it reaches the end of the longitudinally moving barrier rolls by gravity into the fruit-receiving bins in contra-distinction to the construction shown in the Tom Strain patent, where the moment it leaves the end of this member 36, it is still carried forward by the belt until it reaches a mechanical ejector? A. Yes.

Q. Is it your understanding of the structural device, or a structural device built under the Tom Strain patent, that the member 36 is at all times present? A. You mean it might be omitted?

Q. No; whether it forms a part of the invention and constitutes a working part always present in the machine? A. I would take it so from the patent.

(Testimony of Arthur P. Knight.)

Q. You take it so? [276] A. Yes.

Q. Does the upper right angle longitudinally disposed extension of the member 36 serve as a filling stick in the sense in which you employed the term in connection with the device involved in equity suit 2232, and as involved in the Parker modified type of grader which you have testified to?

A. In the sense of the Parker modified type—

The COURT.—Read that question.

(Last question read by the reporter.)

Q. (By Mr. ACKER.) Reverting, Mr. Knight, to this so-called filler stick which you have testified to was employed in the defendants' machine and as disclosed by the photographic exhibits to which you have testified, I understood you to state that that member which you designated as a filling stick, and which you have testified has served to support the longitudinally moving carrier belt from slipping on the inclined surface, would serve to block out or prevent the escape of fruit which might pass beneath the grading section. [277]

Please explain why it is that that fruit would not pass through the grading opening if it was small enough to go through that portion, and beneath that portion of the roller member.

A. This member you refer to, lettered "A," in Exhibit 7 projects somewhat above the bed or table on which the belt runs; therefore, the spacing between it and the roller is necessarily less in width than the space between the body of the table at the grader

(Testimony of Arthur P. Knight.)

opening and the roller, and still more so on account of the enlargement of the roller directly over this part "A."

Q. Now, that space which you refer to is a space of materially less depth than the space which exists between the carrier belt and the grading portion of the rotary wall member for the fruit to escape through, is it not?

A. You mean on account of the enlargement of the roller?

Q. Yes. A. Yes.

Q. Then why it is that fruit which you say might escape beneath the roller adjacent to this so-called filler stick would not escape through the increased area of the discharge outlet?

A. I have in no place referred to this, as I can remember, as a filler stick. I have simply said in some conditions it might serve to prevent the fruit from passing through in case [278] it could squeeze under the roller.

Q. (By the COURT.) The fruit strikes the outlet end of the roller first and then goes to the higher end on this?

A. It strikes the outlet end first, yes.

Q. Then when it got where the roller was thicker, that stick couldn't keep anything from going through; the roller would come closer to the outlet where the fruit went; is that right?

A. I am inclined to think that is correct; at the same time, the point is that the presence of this strip

(Testimony of Arthur P. Knight.)

there would operate as a block independent of the difference in the size of the roll; they both co-operate towards that same end.

Q. (By Mr. ACKER.) What is the length of the roller section, Mr. Knight?

A. What is the total length of it?

Q. The roller section which contains the sizing portion for the escape of fruit.

A. You mean the grading opening?

Q. The roller section.

A. The total roller, my recollection is, it is about three feet.

Q. About three feet; and where is this so-called filler stick located relative to the roller, at which end and at what distance remote from the outlet for sized fruit?

A. It begins at the outlet and extends to the farther end. [279]

Q. What is the length of the outlet or reduced section of the roller member for the escape of the sized fruit? A. 10 or 12 inches.

Q. Then is it your understanding that this so-called filler piece extending from the end of that portion, the reduced portion of the roller member to the other end of it, making a distance of approximately 21 inches, or 22 inches in length?

A. That is my recollection of it.

Q. And your testimony is based on your assumption? A. Yes.

Q. What is the width of the carrier member; that

(Testimony of Arthur P. Knight.)

is, the longitudinally movable carrier member of the Tom Strain Patent, relative to the width of the carrier member of the Fred Stebler Patent, Complainant's Exhibit No. 2, if you know?

A. I have never seen the Tom Strain machine, so I couldn't give any opinion on that.

Q. Is your idea of these grading machines sufficient to enable you to approximate as to what the width of a belt of the Tom Strain device would be from the disclosure of the letters patent?

A. The only thing I have to go by, the representation of an orange, and it shows oranges between the sides of the other.

Q. And doesn't the Tom Strain Patent, Mr. Knight, more [280] particularly in figure 7 of the drawings, illustrate the carrier belt as extending the entire width of the bed over which it travels?

A. Yes.

Q. And how does that compare with the width of the carrier belt in the Stebler device of Complainant's Exhibit 2?

Mr. LYON.—That is objected to as indefinite; there are two belts. Do you mean the conveyor belt?

Mr. ACKER.—I have reference, Mr. Lyon, to the conveyor belt, and believe I so specified in my questions. If I did not, I will so state to the witness.

Mr. LYON.—Of the distributing apparatus?

Mr. ACKER.—The carrier belt for receiving the fruit after it is sized by the grading member.

The COURT.—After it is sized?

(Testimony of Arthur P. Knight.)

Mr. ACKER.—Yes, your Honor, after it leaves the grading member.

The WITNESS.—The same thing is true in the Stebler Patent. [281]

Q. And from your knowledge of an apparatus constructed in accordance with the Stebler device, what is the approximate width of that belt?

A. My memory is not good for dimensions, and I should say it is about—anywhere from 4 to 6 feet.

Q. How is that?

A. The total width anywhere from 4 to 6 feet; I don't remember it.

Q. I understood you to testify, Mr. Knight, by reference to the photographic exhibits before you that if the nuts appearing—which you say are disclosed in connection with the supporting brackets for the roller member of the fruit grader in Complainant's Exhibit Number 4 were loosened, the sizing roller could be adjusted relative to the belt to vary the grade outlets for different sized fruits, is that correct? A. Yes.

Q. In the Strain reissue letters patent, Complainant's Exhibit Number 1, how is the adjustment of the independently and individually rotatable sizing rolls accomplished?

A. By means of the adjusting S working between the two stop blocks P which screws the bolt—stock blocks R which screws the bolt B in and out so as to move the bracket N, which carries the roller.

Q. As a mechanical expert, do you give it as your opinion that the releasing or loosening of the nuts

(Testimony of Arthur P. Knight.)

D', appearing [282] in connection with the supporting brackets illustrated by photo print, Complainant's Exhibit Number 4, so that the roller section member may be raised toward or from the endless carrier belt, was the mechanical equivalent of the adjusting means disclosed in the Bob Strain patent, Complainant's Exhibit Number 1, for adjusting the independent rolls relative to the carrier member, or the opposing member of the runway.

A. Will you give me that?

(Last question read by the reporter.)

A. The releasing of these bolts or nuts and the sliding of the two parts of the bracket on one another or the upper bracket on the support, is, in my opinion, the equivalent of the adjustment in Exhibit Number 1.

Q. (By the COURT.) Now, show me what—this thing here is called D' in this photograph.

A. These bolts slide right up.

Q. Now, that is the mechanical equivalent of what?

A. Of this part here. This nut and bolt, sliding that around, moving that in and out, simply two different ways of moving the adjustment of the roller.

Q. That is called P? A. P is the bolt.

Q. S is the nut? A. S is the nut.

Q. And you would adjust that nut— [283]

A. Turn that nut and adjust that bolt in and out and move the end of the roller.

Q. That is the same as the mechanical equivalent which produces the same effect as D' in 4—mechanical equivalent?

(Testimony of Arthur P. Knight.)

Mr. ACKER.—One is a mechanical equivalent to the other.

A. Certainly.

Q. Now, if I should secure the nuts or loosen the nuts D' associated with the supporting brackets for the roller members of Complainant's Exhibit Number 2, the roller would fall, would it not, by its own weight? A. Unless you held it, yes.

Q. Then you would have to take your hand and hold it or raise it?

A. Adjust it to the height you want.

Q. Now, in order that there may be no misunderstanding on the record, I understand you to say, as a mechanical expert, that to loosen those nuts, let the roller drop, or support it by your hand from dropping, and then to move it back and forth until you got the proper adjusting position, is the mechanical equivalent of the adjusting means for the sizing rolls of the Bob Strain reissue, Exhibit Number 1?

A. Absolutely, so far as the operation of those rolls is concerned.

Q. I didn't ask, Mr. Knight, so far as the operation of the rolls. I said the mechanical adjusting means.

A. That is the only way I understand it. [284]

Q. That is embraced in your answer? A. Yes.

Q. (By the COURT.) Now, in the center of that figure 1, there seems to be two devices for adjusting. Each one of these rolls has one at each end.

Mr. ACKER.—Each one of those rolls, your Honor, is supported at each end by a bracket, and

(Testimony of Arthur P. Knight.)

each bracket moves in and out.

The COURT.—And you can move either end of it?

Mr. LYON.—Yes; move either end of it. The form of that adjustment, Mr. Acker, which you refer to that moves coincidentally is the form of the Rayburn device. [285]

Mr. ACKER.—Yes; if I adjust this end, I move this bracket in, and I move this one in up but there are two bearing brackets in for each roller.

The COURT.—Yes.

Q. (By Mr. ACKER.) From your knowledge as to the operation of the devices constructed under the Robert Strain Reissue Patent, Complainant's Exhibit No. 1, is it or is it not customary in making an adjustment to move the entire roller the length of the roller in and out towards the opposing member of the fruit runway.

A. The ones I have seen, as I recollect it, move bodily.

Q. Just move bodily in the same sense as the rollers on the exhibit in connection with equity suit 2232 are moved bodily? A. Yes.

Q. Have you a copy of the Complainant's Exhibit No. 2, Mr. Knight? A. Yes.

Q. The first Stebler? A. Yes.

Q. In the device of the Fred Stebler patent in suit, Complainant's Exhibit No. 2, the chutes disclosed therein are arranged at a transverse inclination to the longitudinally traveling belt for the sized fruit, are they not?

(Testimony of Arthur P. Knight.)

The COURT.—Read the question.

(Last question read by the reporter.) [286]

A. Yes.

The COURT.—I don't know what that is all about.  
Show me on that thing what you said.

A. (Indicating to the Court.) These chutes formed by these guides are arranged at a transverse inclination to the traveling belt.

The COURT.—Oh, yes.

Q. (By Mr. ACKER.) Now, how many of those guides does it take to constitute a chute, Mr. Knight?

A. Well, of course, a chute is formed by the space between two adjacent guides.

Q. That is, it takes the two inner walls of two guides to form the chute? A. Yes.

Q. And it is those chutes formed by the two guides which guide the sized fruit from the sizing outlet to the bin into which it is to be deposited; is that correct? A. Yes.

Q. Do means other than these chutes appear in the said Stebler patent for guiding and directing the sized fruit from the grading member to the bins to receive such fruit?

A. Well, there is—in case the belt is inclined, it is gravity which tends to cause it to move; in fact, in lines 88 to 95, page 3 of the patent, it is stated that one of the objects of inclining the conveyor is to cause the [287] oranges to roll without having to rub forcibly against the guiding means.

Q. Are you familiar with the device known as the

(Testimony of Arthur P. Knight.)

Ish grader, and covered by Letters Patent No. 458,-442?

Mr. LYON.—Just a moment. That is objected to as not cross-examination.

The COURT.—I will overrule the objection.

Mr. ACKER.—It is cross-examination, your Honor.

The COURT.—Go ahead. I have overruled it.

Mr. ACKER.—It appears in the patent, your Honor, and forms a part of this patent. This witness has testified he understands the patent.

A. Yes.

Q. You have examined those machines in operation, have you not? A. Yes.

Q. What is the length of the grader of the Ish—known as the Ish or California grader under the Ish patent?

A. As I say, my memory for dimensions is very poor, but as I remember it, it is a very short grader.

Q. Now, what is the length of the bins—that is, the total all over length of the bins that are employed in connection with the Stebler distributing system, and as disclosed by the Stebler Patent, Plaintiff's Exhibit No. 2?

A. With the same qualification, I should say about 40 or 50 feet; that is just a guess. [288]

Q. Well, about 40 feet; and the Ish grader to which he makes reference here, is about 12 feet?

A. 12 or 15 feet, I should say.

Q. Therefore, your fruit receiving bins, under the Stebler patent is extended and projected something

(Testimony of Arthur P. Knight.)

like 28 feet beyond the grading element of the Ish device, is it not?

The COURT.—Read that.

(Last question read by the reporter.)

The COURT.—The Ish device. Now, what is the Ish device?

Mr. ACKER.—The Ish device, your Honor, is what is known as the California grader which has been in litigation in this court, and it is a roller consisting of 9 sections so as to get 9 sizes of fruit, and I have a copy of the patent I was going to introduce in evidence as we go along, and the purpose for which I was asking the witness now, is that the patent refers to that.

The COURT.—Let him answer that.

A. The patent does not show any such disproportion, but the machines I have seen with the Stebler distributor were made with the grader—grading element and are considerably longer than the old Ish machines.

Q. Well, in the graders as constructed by the complainants herein, and which you have examined and seen in operation, how does the length of the grader compare approximately [289] with the length of the bins arranged alongside of the longitudinally traveling fruit carrier, and which are located alongside thereof, to receive the sized fruit? [290]

A. As far as my memory serves me, it is some time since I have seen the machines; I should say it was anywhere from 12 to 15 or 20 feet.

Q. Now, in order that there may be no misunder-

(Testimony of Arthur P. Knight.)

standing when we come to arguing this case regarding the meaning of your testimony, I will ask you to explain what you understand to be the grader element referred to in the Stebler patent, Complainant's Exhibit Number 2?

A. It is that part of the machine which sizes the fruit and delivers the sized fruit at distributed points along a longitudinal runway.

Q. That is, you mean the rotary member of the fruit runway, and which member is adapted to segregate the run of the fruit passing through the fruit runway into a number of distinct sizes of fruit?

A. This rotary member, in connection with the traveling grader.

Q. Yes. I mean is that the entire length of the rotary member. You can consider the grader and have so referred to the grader with that meaning when testifying.

A. You are speaking now of the Stebler machine?

Q. Yes, sir; and does that not hold good as to defendants' machine?

A. Only in this way, that in the defendants' machine there is at the lower end of the machine an idle portion of each roller of a greater diameter which really disables it from [291] any grading operation, so that I would consider that the grading stops with the increased diameter.

Q. You mean the portion of the shaft which extends beyond the last diameter of the—

A. That portion of the shaft and the terminal portion of the last roller, which is of too large diameter

(Testimony of Arthur P. Knight.)  
to permit the fruit to pass through.

Q. Now, in the defendants' machine are bins extended beyond the grader?

A. As shown in Exhibit 5 the bins are extended beyond the grader or grading element in that exhibit.

Q. Referring to Exhibit 5, I will ask you to mark by a reference numeral thereon that which you mean in your last answer to be the bins extended beyond the grading element.

A. I will mark it by the letter W.

Q. Now, having marked that portion with the letter W, please show me where it appears on this said photographic exhibit, that it is extended beyond the grader of the apparatus with reference to the one you have marked, Mr. Knight.

A. Well, I have got to go by the machine. This photograph does not show all the parts of the machine; I have got to take this exhibit in connection with other exhibits; for example, exhibit 4.

Q. That is what I thought, and that is why I asked you the question, as it does not appear on Exhibit 5. Now, you will take any one or other or more of the complainant's [292] photographic exhibits and mark thereon by the same reference letter the bins which you have extended beyond the grading element, and which in your opinion are bins extended beyond the grading element.

A. Even on Exhibit 5 it is apparent that this portion of the machine directly over the last bin marked W was not intended for grading, if the grading was to be effected by raising the belt, since the fittings

(Testimony of Arthur P. Knight.)

which are indicated at "I" for the other grading aperture are not present in this portion, but as I have said, I have got to read this photograph in connection with what I know of the construction of the machine as shown in the other photographs, and from Exhibit 2 it is apparent that this last section is in part, at least, occupied by a bar shaft, and a part of the next section is occupied by an idle enlarged roller, so that the construction of the machine, as shown by these two Exhibits 4 and 5, is such that the bin marked W in Exhibit 5 extends in part, at least, beyond the last grading bin.

Q. Now, have you marked on the other photograph the same reference numeral as you placed on the photographic Complainant's Exhibit 4, so we may understand your last answer?

A. Yes; I applied the letter "I" to the Exhibit 5.

Q. Now, you have applied the letter W to Exhibit 5. Now, I ask you to apply the same letter to designate that portion which you say here in Complainant's Photographic Exhibit Number 4, corresponds with the part which you have marked with the reference numeral W in Complainant's Exhibit 5? [293]

A. (Marking on exhibit.) I can only apply the letter W to the extreme lefthand corner of the bin space in Exhibit 4, this being at the left of and beyond the last grader opening. Apparently the partitions were not in place in the bin in this exhibit.

Q. In Complainant's Photo Exhibit No. 4, does reference numeral G which you have placed thereon indicate an outlet for sized fruit, or what does that indicate?

(Testimony of Arthur P. Knight.)

A. It indicates an opening formed in a longitudinal board below the table which carries the grading belt, but it is not strictly a grading outlet.

Q. It is an outlet through which the sized fruit escapes in its path of travel by gravity towards the fruit receiving bin? A. Yes.

Q. Now, with Photo Exhibit No. 5 before you, Mr. Knight, will you explain to me what that portion is which I will designate by the reference numeral W'?

The COURT.—That is in 5?

Mr. ACKER.—That is Photo Exhibit 5.

Q. (By the COURT.) What is it now you are talking about?

A. Right here. (Indicating to the Court.)

Q. That is W'? A. W'.

Q. You mean that aperture there? (Indicating.)

[294]

A. Yes; that is an aperture left in the grading table so that the fruit can pass after it has been graded to the bin, and this portion of the grading table, which is run over by the fruit before it reaches such aperture, forms in effect a distributing means in connection with the conveyor belt to aid in carrying the fruit to the last bin from the comparatively short grader.

Q. (By Mr. ACKER.) Mr. Knight, I didn't ask you about the latter part of your answer. I asked you what that was.

Q. (By the COURT.) Now, is this the upper end or lower end of the grader?

(Testimony of Arthur P. Knight.)

A. Lower end.

Q. (By Mr. ACKER.) Now, is that an outlet opening in the same sense as the outlet opening which you have designated by the reference letter G on Complainant's Photo Exhibit No. 4?

A. It is in the same sense, yes.

Q. Now, what fruit is it that escapes through that outlet?

A. It is the fruit which has been already graded by passing through the last grading opening, and it has been carried forward to that outlet by the longitudinal motion of the belt, and by running along the wall in advance of this opening until it reaches this opening.

Q. You say running along a wall in advance of that [295] opening. What wall have you reference to?

A. The part of the table which is in advance of that opening you referred to.

Q. Does that appear on the photo?     A. Yes.

Q. This whole piece you have reference to?

A. Let me show it to you. I marked that T.

Q. Now, am I correct in the understanding of your testimony that the fruit as sized by the grading element flows through these different outlets, one of which you have marked by reference letter W' in Photo Exhibit No. 5, and by the reference letter G in Complainant's Photo Exhibit No. 4, and after passing through there is received on to a longitudinally traveling belt?     A. Yes.

Q. How much of the bin which you have referred to and marked by the reference letter W in Com-

(Testimony of Arthur P. Knight.)

plainant's Photo Exhibit 5 extends or is projected beyond the sizing portion of the rotary wall member of the grader?

A. All of the bin W and part of the next preceding bin.

Q. And you know that from your knowledge of the machine as operated?

A. Not as operated, because I didn't see it operated.

Q. And what fruit, if you know, flows into that bin? A. You mean what size?

Q. Yes. [296]

A. I take it that the sizes that run into that bin would be the over large.

Q. That is the overflow?

A. Yes; over large size.

Q. That is, what would be the overflow from the discharge end of the machine ordinarily. It is not one of the sizes included in the nine sizes to which we attempt to size fruit; is that correct?

A. As I understand it, the over large size are marketable from the marketable size.

Q. But is not one of the sizes which ordinarily flows through the sizing apertures?

A. Not that runs through the grading opening.

Q. Now, where is that size fruit taken as regards the series of bins in the Stebler patented apparatus, Complainant's Exhibit No. 2?

A. I take it it would be carried along by the conveyor 10 above the last guide 13 and 12 and discharged into the last bin. [297]

Q. Now, will you please mark on figure 1 of the

(Testimony of Arthur P. Knight.)

patent drawings, Complainant's Exhibit Number 2, by reference letter A, the bin into which that fruit will go over the reference letter A', the chute which conveys it to that bin. (Witness marks as instructed.)

Q. So that fruit which you have referred to is carried for quite a distance beyond the terminal end of the grader proper, and there is interposed between that particular bin and the terminal end of the grader proper a series of bins for receiving sized fruit; is that not correct, Mr. Knight? A. Yes.

Q. And that is your understanding of the construction and operation of the complainant's device of Patent Exhibit Number 2?

A. If you mean by that its construction and operation would necessarily be limited to having a series of bins, no.

Q. I didn't ask that, Mr. Knight, no; I asked you if such was your understanding of the construction and operation of the machine as you have seen it in operation and constructed? A. Yes.

Q. Mr. Knight, is there any provision made in this Stebler patent by which these so-called partitions which form the chutes may be arranged directly parallel with the longitudinal traveling carrier belt for the sized fruit? A. No.

Q. Now, referring to these photo exhibits once more, [298] Mr. Knight, I will ask you to state if you know by whom the barrier pieces of the defendants' device were removed from their longitudinal position and placed at an incline transverse of the

(Testimony of Arthur P. Knight.)

longitudinally traveling belt, so as to form what appears in the said Photo Exhibit Number 5 as a chute for directing the flow of the fruit into a fruit receiving bin? A. I don't know.

Q. Did you examine the machine prior to its being photographed? A. Yes.

Q. Were the barrier strips arranged in that position when you first examined the machine?

A. No.

Q. They were not? A. No.

Q. Then after your first examination of the machine, until your second examination, or did you make it afterwards and see the strips—the barrier strips placed in that position?

A. The only thing I can say as to that is while we were examining the machine a great many of the barrier strips were not in position at all, and just to satisfy ourselves we put some of them on obliquely to see whether they could be made to put on obliquely with the same fastening devices; we saw they could. As to when that particular adjustment was made, I cannot say. [299]

Q. After satisfying yourself you could mutilate, so to speak, and arrange the barrier placed in this convenient position, a photograph was made of it for the purpose of this case, is that correct?

Mr. LYON.—That question is objected to as not cross-examination and assuming facts not shown by any of the testimony.

The COURT.—I think you had better frame your question in a different way.

(Testimony of Arthur P. Knight.)

Q. Did you arrange those cleats that way for the purpose of photographing it?

A. No; I didn't arrange them.

Q. Who did? A. I don't know.

Q. (By Mr. ACKER.) Do you know whether they were arranged for that purpose? A. I do not.

Q. Now, even when they are arranged in that position, what function would they perform, or, rather, what useful function would they perform relative to the gravity flow of the sized fruit from the grader into the bin which was to receive that sized fruit?

A. As arranged in the photograph, only one of these could apparently serve any useful function; that is the middle one which would serve to direct the fruit forward.

Q. But even in that position, would it form a chute in the [300] sense as the chute is formed in the complainant's patent Exhibit 2?

A. Not by itself, but if two of them were put in similar positions, one after the other, they would form a chute.

Q. And you believe such an arrangement could be made of those barriers? A. I certainly do.

Q. Now, when they were so arranged, the fruit would flow by gravity into the bin, would it not?

A. If they were both extending obliquely forward —transversely inclined, as you call it, in the direction of the conveyor belt, they would tend to drag the fruit forward into the bin.

Q. What is the width of those barrier strips or pieces, Mr. Knight?

(Testimony of Arthur P. Knight.)

A. Oh, I should say perhaps 15 inches, maybe.

The COURT.—Were they of different lengths?

Mr. ACKER.—No, your Honor.

The WITNESS.—All the same length.

Q. (By Mr. ACKER.) All the same length.

Now, what is the width of the inclined table over which the belts travel?

A. Well, from the center to each side I should say it would be anywhere from 18 inches to 2 feet a piece.

Q. Then you believe you could take these 14-inch strips and you can place them at any angle you want and still take the fruit over that table from the sizing position of the rotary wall member into its proper position in the bin? A. No, sir. [301]

Q. How?

A. No, sir; that wasn't my idea. The fruit has first to pass over the upper conveyor, which is inclined, and it runs down against that wall, which we see in the exhibits. Then it passes through that opening and from there out to the outer edge of the belt. It is not—where is the exhibit? (Receiving exhibit from Mr. Acker.)

Q. (By the COURT.) Would the strips obliquely to the belt perform any different function than what they would perform longitudinally to the belt? Wouldn't it form the same thing exactly?

A. In final results, yes, because when you put them obliquely gravity aids in carrying it down across the belt, while guided by the chute, whereas, if you put them longitudinally, it is an intermittent action to the barrier, along the barrier, and then by

(Testimony of Arthur P. Knight.)

gravity again to the next barrier, and then off the belt; the final result is the same.

Q. (By Mr. ACKER.) Did you find in your examination of the machines which you examined at Porterville any means which could be arranged obliquely to the path of travel of the belts and by which the sized fruit could be conveyed at a distant point from the discharge end of the machine, and by distant point I mean a point approximately the same distance remote from the discharge end of the machine as is disclosed in the Stebler patent, Plaintiff's Exhibit 2? [302]

A. Not such a great distance, no.

The COURT.—Now, let's see, Mr. Witness. Are there two belts on the outside of the roller on each side?

Mr. LYON.—You have a sketch of that, haven't you, in your pocket?

The WITNESS.—I have.

Mr. LYON.—Produce that, and that will answer the Court's question.

Q. (By the COURT.) Take Exhibit 5—Oh, well, let it go. I will find that out. I suppose you will come to it.

A. There are two belts in this machine, one inside of the lines of the rolls and two outside of the wall, one directly under the wall and two out; those outside ones are shown very clearly in exhibit 5.

Q. They both run towards the head of the machine, both of those belts?

(Testimony of Arthur P. Knight.)

A. The inner one. The upper one runs toward the head; the lower one runs toward the foot.

Q. (By Mr. LYON.) You have a sketch you made of that the time you were up there?

A. Yes, sir.

Q. Does that show the relation of those particular belts on the Porterville Citrus Association machines?

A. It shows the relation of these belts to the grading element. [303]

Q. Will that answer the court's question?

A. Yes.

Q. Produce that now and show it to the Court.

Q. (By Mr. ACKER.) Is this the sketch, Mr. Knight, that you have just handed me that you claim will elucidate that which the Judge asked you to explain? A. I think so.

Mr. ACKER.—I will offer the sketch in evidence and ask it be marked Defendants' Exhibit "A" on cross-examination.

The COURT.—Let it take the next number. Why call it prime?

Mr. ACKER.—Because I have exhibits in the case that have been marked A.

Mr. LYON.—They have not been offered here.

Mr. ACKER.—You can mark it X.

Mr. LYON.—This is the first exhibit.

The COURT.—He has other exhibits he wants marked differently. I don't care, if he wants it marked that way.

Q. (Mr. ACKER.) With the photo exhibits be-

(Testimony of Arthur P. Knight.)

fore you, Mr. Knight, and which have been introduced in evidence on behalf of the defendant, you will please point out wherein there is illustrated by any of the said photographs deflected means, which, in conjunction with another deflecting device, or means arranged in such a manner as to form a chute or runway, is provided with a telescopic extension.

[304]

A. I do not find any deflecting means with a telescopic extension.

Mr. ACKER.—That is all, Mr. Lyon.

Redirect Examination.

(By Mr. LYON.)

Q. Referring to Plaintiff's Exhibit No. 2, you have marked with the letter A the bin to which the over-sized fruit is delivered.

The COURT.—In 2?

Mr. LYON.—Exhibit 2.

The COURT.—Oh, yes; that is the exhibit marked—Is that the last bin there? (Indicating on the exhibit.)

Mr. LYON.—The last bin marked 11. The last bin at the left-hand side, or at the delivery end.

The COURT.—What have you got that marked?

Mr. LYON.—A.

Q. Now, leading to this bin is only one guide arm or deflector composed of two parts 12 and 13; is that correct? A. Yes.

The COURT.—In other words, there is no chute.

Q. (By Mr. LYON.) In other words, the chute

(Testimony of Arthur P. Knight.)

is composed simply of the bottom side of it in gravity; is that correct? A. Yes.

Q. And that is all true of all these chutes so far [305] as the operative function is concerned, as to the individual chute?

A. I would say that generally speaking both sides of the chute were operative, according to whether the fruit intended to roll or intended to carry along the belt. [306]

The COURT.—Is there a belt along there?

A. Belt number 8.

Q. (By Mr. LYON.) And that would depend to a great extent on the amount of inclination given to the belt? A. It is stated so in the patent.

Q. And if it were a flat belt, it would require both sides of the chute, and when so, no inclination transversely of the belt to cause the fruit to roll off?

A. If it was a flat belt it would require the further slide, as it would have to be forced off.

Q. Now, referring to Plaintiff's Exhibit Number 3, the Thomas Strain patent, on cross-examination you were referred to the flat portion of the distributor belt which held the oranges or other fruit to be carried on the belt until forcibly ejected by the part 36-B. What have you to say with reference to this construction and the necessity of any such part 36-B in case the belt were simply inclined all of its transverse direction and not flattened out on the lower edge?

A. In that case the fruit would simply roll off the edge of the belt as soon as it passed the end of the

(Testimony of Arthur P. Knight.)

lower longitudinal portion of the member 36.

Q. Then that would be in the same identical manner as the fruit rolled off of the defendants' machines after they passed one of the deflectors arranged horizontally on the distributing systems of those machines, would it?

A. It would be the same as when it leaves the last one of [307] these barriers or deflectors.

Mr. LYON.—We offer in evidence in connection with the testimony of the witness a sketch made by Mr. Knight on November 12, 1915, at Porterville, and referred to in his direct examination, and ask the same be marked Plaintiff's Exhibit 10.

The COURT.—I thought Mr. Acker put that in.

Mr. LYON.—No; this is the other one. This is the one that Mr. Knight produced on direct examination; I had not before offered it. That is all, Mr. Knight.

Mr. ACKER.—I have no further questions.

Mr. LYON.—With the exception of the reservation of the right to show the joint construction between the roller sections of the defendants' machines in case we cannot agree upon a suitable sketch thereof, that completes the plaintiff's case.

Mr. ACKER.—Well, we have that sketch now, Mr. Lyon, if you want to examine on it.

The COURT.—In the exhibit number 3, figure 7, Tom Strain patent, there is apparently an orange up in the middle of the thing. What does that mean?

Mr. LYON.—That is up in what we call a cull

carrier, and so forth, on the other machine; it is no part of the grader proper.

The COURT.—Well, proceed with the defense.

Mr. LYON.—Or that may indicate a hopper at the end of the [308] machine from which they first roll down; either one; it is not clear.

Mr. ACKER.—If your Honor please, I wish at this time to offer in evidence on behalf of the defendants certified copy of the file wrapper and contents of the application which eventuated in the granting of United States Letters Patent Number 943,799 to Fred Stebler under date of December 21, 1909, for an improved distributing apparatus, and ask that the same be marked Defendants' Exhibit "A."

Mr. LYON.—I would like, of course, just to reserve the right to inspect these long documents to see that they are complete; there is no objection to them if they are complete.

The COURT.—Let them be marked Exhibit "A."

Mr. ACKER.—I will introduce in evidence a certified copy of the wrapper and contents which eventuated in the granting of the United States Letters Patent Number 775,015 to Thomas Strain under date of November 15, 1904, for improvement in fruit graders and ask that the same be marked Defendants' Exhibit "B."

I offer in evidence uncertified printed copy of United States Letters Patent Number 456,092 granted to H. H. Hutchins under date of July 14, 1891, for an improved sorting machine, and ask that

the same be marked defendants' exhibit Hutchins' patent number 456,092.

The COURT.—That is exhibit 2.

Mr. LYON.—Of course, if the offer is made of this patent, [309] or any other patents of the prior art with relation to the invention disclosed and claimed in plaintiff's exhibit number 1, the same is objected to on the ground that the matter is foreclosed by the decision of our Circuit Court of Appeals in case number 1562, and that both parties are bound by the construction and interpretation therein placed upon the claims 1 and 2 of that patent herein sued upon, and that the defendants cannot show prior patents or prior structures for the purpose of limiting the claims of that suit, [310] or securing any other interpretation than the interpretation thus given by our Circuit Court of Appeals in that case, and in that connection I call your Honor's attention to the decision of a Circuit Court of Appeals for the Seventh Circuit in Murray vs. Orr, 153 Fed. 369, which said, "That it is not open to defendants on the question of additional infringement to refer to the prior art, but limit the scope of the invention as we have found it in determining the infringement of the Columbia ladder." In other words, our interpretation is this: That the interpretation to be given to the Robert Strain invention and the claims thereof have been finally determined between the plaintiff and the defendant Parker, who has control, as I said here, of this litigation and is defending it at his cost and expense under con-

tract, and the interpretation and decision in that case is just as binding in this suit, as far as the interpretation of that patent is concerned, as it was in the other, and that we must stand, both of us, upon that interpretation. Of course, this objection, however, will not rule out of this case these patents as they may be urged, if counsel so sees fit, against the alleged infringement disclosed, if they be applicable thereto, in either the Fred Stebler patent, Plaintiff's Exhibit No. 2, or the Tom Strain patent, Plaintiff's Exhibit No. 3, but I want to be understood as reserving that objection to that, as to any offer as to the Plaintiff's Exhibit No. 1, and if the Court does not [311] see fit to rule on that proposition at the present time, why, it may be considered later, and either side may be understood to have an exception to a ruling of the Court whichever way it goes.

The COURT.—I don't think that can be made as an objection to the evidence. I don't know what the courts have decided about that thing.

Mr. ACKER.—There is no decision, your Honor, that will bear out the statement made by counsel. I would be glad to be shown it and read it.

The COURT.—I will overrule the objection.

Mr. LYON.—Note an exception.

Mr. ACKER.—I wish to state, so there will be no misunderstanding, on my part I propose to use the patent references to all purposes to which patent references of anticipatory matters may be used in a patent suit.

Mr. LYON.—To save the time of the Court, it will be understood, so far as the Plaintiff's Exhibit No. 1 and the interpretation of that patent, this same objection is urged to each and all of the prior patents, and to the action of the Court in admitting them, the plaintiff excepts. I do not want to take time to repeat that.

The COURT.—How many of them are there?

Mr. ACKER.—*There quite* a number of them.

The COURT.—Is that agreeable to you, Mr. Acker, to have that stipulation, that he objects to all these patents, [312] and objection overruled and exception entered?

Mr. ACKER—Why, certainly; perfectly satisfactory. I offer in evidence printed uncertified copy of United States Letters Patent No. 247,428, granted H. B. Stevens, under date of September 20th, 1881, for an improved apparatus for sizing oranges and other fruit, and ask that the same be marked Defendants' Exhibit "D."

I offer in evidence printed uncertified copy of United States Letters Patent No. 430,031, granted J. A. Jones, under date of June 10th, 1890, of an improved machine for sorting or sizing fruit, and ask that the same be marked Defendants' Exhibit "E."

I offer in evidence on behalf of the defendants, printed uncertified copy of the United States Letters Patent No. 458,422, granted J. I. Ish, under date of August 25th, 1891, and ask that the same be marked Defendants' Exhibit "F."

I offer in evidence printed uncertified copy of

United States Letters Patent No. 654,281, granted M. P. Richards, under date of July 24th, 1900, for an improved vegetable or fruit separator, and ask that the same be marked Defendants' Exhibit "G."

[313]

I offer in evidence printed uncertified copy of United States Letters Patent Number 465,856, granted December 29, 1891, to H. H. Hutchins, improved fruit and vegetable assorter, and ask that the same be marked Defendants' Exhibit "H."

I offer in evidence printed uncertified copy of United States Letters Patent Number 527,953, granted F. N. Ellithorpe under date of October 23, 1894, for an improved machine for sorting, grading fruit, etc., and ask that the same be marked Defendants' Exhibit "I."

I offer in evidence on behalf of the defendants as against the Fred Stebler patent in suit printed uncertified copy of United States Letters Patent Number 775,015, granted Thomas Strain under date of November 15, 1904, and ask that the same be marked Defendants' Exhibit "J."

Mr. LYON.—That is objected to as needlessly incumbering the record. A copy of that has already been offered in evidence; it is one of our exhibits and the patent sued on.

Mr. ACKER.—Simply my own exhibit as my own defense.

The COURT.—I will sustain the objection.

Mr. ACKER.—I have no desire to incumber the record at all; I am perfectly willing to withdraw it.

The COURT.—When it is offered it gets in the record, so far as incumbering the record is concerned, but I think it is immaterial, but it is already in.

Mr. LYON.—The one in may be considered for all purposes [314] for which another one might be introduced.

Mr. ACKER.—That is all right then. I offer in evidence then printed copies of United States Letters Patent Number 741,928, granted C. Rayburn under date of October 20, 1903, for an improved apparatus for sorting and distributing fruit, and ask that the same be marked Defendants' Exhibit "J."

I offer in evidence printed uncertified copy United States Letters Patent Number 835,805, granted to J. T. Backstrom under date of November 13, 1906, for an improved assorting apparatus, and ask that the same be marked Defendants' Exhibit "K."

I offer in evidence printed copy of United States Letters Patent Number 147,301, granted D. A. and A. B. Banker February 10, 1874, for an improved machine for sorting potatoes, and ask that the same be marked Defendants' Exhibit "L."

I offer in evidence printed copies of United States Letters Patent Number 878,618, granted R. M. Widney under date of May 2, 1905, for an improved fruit grader and separator, and ask that the same be marked Defendants' Exhibit "M."

Mr. LYON.—With reference to what is the last exhibit offered?

Mr. ACKER.—Which?

Mr. LYON.—The Widney patent. The reason for that, it is too late in regard to two of the patents in suit, and I wanted the records to show that it was admitted solely for the purpose of the other one.

[315]

The COURT.—Solely for the purpose of what?

Mr. LYON.—The patent to Widney is too late in point of time to affect the Robert Strain invention, Plaintiff's Exhibit Number 1, or the Thomas Strain invention, Plaintiff's Exhibit Number 3, and it would be irrelevant and immaterial as to those two inventions; therefore I think the offer should be limited—

The COURT.—It is dated after those patents?

Mr. LYON.—Yes.

Mr. ACKER.—Now, if your Honor please, the Widney patent is offered in evidence in connection with the Thomas Strain patent of 1904.

Mr. LYON.—That is objected to on the ground that it is irrelevant and immaterial, having been issued after the issuance of the Thomas Strain patent even, let alone being years after the application for the Thomas Strain patent. The Thomas Strain patent, Plaintiff's Exhibit Number 3, was issued November 15, 1904, and the Widney patent was not issued until May 2, 1905.

The COURT.—I can't see what bearing it would have, unless it would have some bearing on the—

Mr. ACKER.—And in connection with the offer of the Widney patent, I offer in evidence a certifi-

cate of the Commissioner of Patents as to the filing date of the application of the said Widney patent, together with a certified copy of the letters patent attached thereto, and ask that the same be [316] marked Defendants' Exhibit "N," or make it "M," in connection with the Widney patent. [317]

Mr. LYON.—That is objected to on the ground that the certificate in itself is incompetent and not one authorized by law, and not a certificate as to the filing of any given application or applications for letters patent, it being a mere recital and unauthorized certificate, and therefore incompetent; and second, on the further ground that even therefrom it appears that there was no publication or granting of a patent or patenting of the Widney device until after the actual granting of the Plaintiff's Exhibit No. 3, and the same is of no part of the prior art, applications for letters patent being secret and not being public knowledge, and even applications are not competent evidence; and further that it is not pleaded that this man Widney was, in fact, a prior inventor, but the only pleading being on this patent as a patent and printed publication, and therefore the certificate, and even the fact, or alleged fact of prior invention by Widney is not admissible under the pleadings.

Mr. ACKER.—The certificate is filed under and in accordance with section 892 of the United States revised statutes, which provides— (Reading section referred to.)

The COURT.—I understand Mr. Lyon to be mak-

ing the objection it is not a copy; it is simply a certificate as to the existence of a fact.

Mr. ACKER.—This is a record of the United States Patent Office; it is not a copy of the patent which is provided [318] for by the section; it is a record belonging to the patent office. We had this question up once before with Judge Wellborn. Judge Wellborn decided as to the admissibility of such a certificate, and we have had that up with Judge Van Fleet with the same ruling. Mr. Lyon and I tried it out before Judge Wellborn and he admitted them.

The COURT.—What is that?

Mr. ACKER.—Judge Wellborn made the ruling that they were entitled to be admitted as a printed copy of the records of the patent office.

Mr. LYON.—I can explain to your Honor my objection there, and it is that is not a copy of the application; that is not a copy of the file wrapper of the application, but it is simply a recital that man filed some application on that date. Now, whether his application was in the form in which it becomes a patent or not, does not appear for a certainty, and to illustrate that, if, for instance, we took the Plaintiff's Exhibit No. 3 and a certificate of that kind, we find that the certificate would be untrue because in that case we find that the drawings have been changed after the application, and certain corrections made, so that is a recital of the fact that they filed some kind of an application, but not that particular application, and therefore it is

not within the section of the statute that counsel refers to, because it is a recital, and there is no evidence as to what kind of an application the man [319] filed at that time, or what was disclosed in that application. That might be a sufficient proof that he filed some kind of an application for some kind of a patent on the date recited, but it is not any proof that was the application, or anything of that kind, but the further and even more serious objection to the offer is the fact that it is inadmissible totally under the pleadings in this case.

The COURT.—Now, let us dispose of one of these objections at the time. Is there any authority on that?

Mr. ACKER.—I haven't looked up those.

The COURT.—I will take this first sheet here. It is simply a certificate of the application. *It not* an evidence of anything except that the filing is a copy. Now, that is the way it looks to me, and in this copy it says that this application was filed January the 2d.

Mr. ACKER.—That is correct.

The COURT.—Application filed January 2d, 1903, patented May 2d, 1905; that is part of the Patent Office. I don't see that this certificate here has got anything to do with anything except the filing is a copy, and it is simply a certificate of the files.

Mr. ACKER.—It is a certificate; that is a true copy of the records of the Patent Office.

The COURT.—Now, you made another objection. What is it, Mr. Lyon?

Mr. LYON.—The important part of that is that file is [320] no better than the printed copy, and that certificate is absolutely a recital and not proof of the facts. There is no authority—

The COURT.—This is a certified copy of the record of the office. What the weight of it is, is another thing. [321]

Mr. LYON.—The next point of that objection is that it is too late in point of time, and it is not admissible under the pleadings.

The COURT.—What about the pleadings?

Mr. LYON.—He has not pleaded that this Widney is a prior inventor; he has pleaded a patent and publication. Now, the patent and the publication of that is subsequent to our application. Under the pleading he gives notice solely that he relies on the date of the patent as a patent.

The COURT.—You had better get out the pleadings if you are insisting on the objection.

Mr. ACKER.—I am introducing that in evidence showing the pendency of the two applications in the patent office, the application of Mr. Widney pending concurrently with the application of Mr. Strain and filed ahead of the application of Mr. Strain. Now, we want to show by that document the construction which the United States Patent Office places upon these inventions. Here are two devices, two forms of graders, the applications pending in the office at the same time, and in fact the Widney application being a prior application to the Strain; it is true that the Widney patent—

Mr. LYON.—I don't see it in his defense, whatever.

The COURT.—Refer to your pleading, Mr. Acker.

Mr. ACKER.—In the Porterville suit.

Mr. LYON.—You said with regard to the Thomas Strain patent, and that is the bill of complaint in the A-50. [322]

Mr. ACKER.—I will have to point you to the stipulation confining the records on the same testimony.

Mr. LYON.—It is not material as to anything except the—as to the Robert Strain—

Mr. ACKER.—If your Honor please, I am not disposed to waste time on an immaterial proposition. I care not whether the matter is introduced in evidence or excluded, and rather than have an argument on that point I will withdraw the offer to save the objection. We are wasting time over useless propositions. Mr. Colyer, you have a deposition that was taken in Florida, I believe. I think we will save time, under the new rule of being opened and filed. I shall read that first. I don't know what your Honor's requirements are in these matters, but Judge Van Fleet always insists that we read these depositions, and I suppose that is the better policy. It gives the court knowledge of the testimony as we go along.

The COURT.—I think it is sometimes better to state in an ordinary form what the depositions show.

Mr. LYON.—To save the Court's time at the pres-

ent time, inasmuch as these depositions refer to only one branch of your defense, that they be considered read; that is, you name the depositions that you so consider, and then refer to such portions of it as you want when you come to argument. We have got to argue the case. I have no objection to the deposition as a deposition, and as to the application [323] the deposition, it won't be apparent to the Court—

Mr. ACKER.—Are there any objections which you wish to raise that are waived? If there are any objections to be urged against any of these depositions, we will take them up as we go along.

Mr. LYON.—I don't think there is any objection to the testimony.

Mr. ACKER.—We will then consider these depositions read.

The COURT.—I will make an order of the court that all exhibits filed will be considered read. Some of them, at least, have been filed without being read. All papers filed as exhibits will be considered read, so you can file that as an exhibit and consider it read.

Mr. ACKER.—All right. I offer in evidence the deposition taken at Citra, Florida, which has been filed, and will be considered read. Now, I have another deposition also, and the same rule will apply to that.

The COURT.—Now, in regard to these depositions, they may be read upon the argument, and it might take up time and argument that wouldn't otherwise be taken up, but the argument is limited,

so I think you had better go through the depositions now and see what is in them; that is my idea about it. You can choose to do what you think proper.

Mr. ACKER.—Your Honor suggests we read the deposition?

The COURT.—Sir?

Mr. ACKER.—Your suggestion is that we read the deposition? [324]

The COURT.—Either state what is in them or read them.

Mr. LYON.—Of course, my objection in regard to the printed copies of the patent, so far as the Robert Strain patent, Plaintiff's Exhibit 1, applies to these depositions also, and it will be understood I take the same exception, the objection being that it is not admissible to show the prior state of the art for the purpose of limiting the Robert Strain patent, it being already *res adjudicata* between the parties, and so forth. The same objection I will urge in regard to the prior art as to the Robert Strain patent. [325]

The COURT.—Well, I think that objection should be sustained, because I don't know what is adjudicated, unless proven. I mean the objection should be overruled, because I don't think that can be made as an objection to the evidence.

Mr. LYON.—We will take our exception.

Mr. ACKER.—Then I shall start in to read this deposition.

The COURT.—Yes. Do you think you want to read it all?

Mr. ACKER.—They are not very long, your Honor.

The COURT.—All right; go ahead.

Mr. ACKER.—If you are satisfied, Mr. Lyon, to let me put this in a recital form to his Honor, I shall do it and not read the whole deposition.

Mr. LYON.—I am satisfied for you to state the substance.

The COURT.—Yes. The Court can get the better sense out of it.

Mr. ACKER.—This is the deposition, if your Honor please, of a witness taken at Citra, Florida, relative to the prior use, manufacture and sale of a fruit sizer or orange sizer that was patented in the year 1881 to one H. B. Stevens, who is alive at the present time and gave his deposition.

Mr. Stevens testifies that he manufactured and sold an apparatus conforming to and covered by the letters patent, [326] and that that apparatus was adapted for the sizing of oranges. It discloses in the drawing what may be termed a double sizer; that is, a sizer composed of two runways; that is, two fruit runways or gradeways, and that each fruit runway or gradeway is composed of two parallel members; one of the parallel members is composed of a series of end to end pieces arranged throughout the runway, and I think they appear by the reference letter G. Now, the device was set at an incline and the fruit delivered to it at the head or feed end, rolled by gravity through the fruit runway until it reached

the point of proper size to permit the orange to drop through, when it would fall into a bin or box situated there beneath to receive that sized fruit. There were a number of sizes provided in the runway, and the testimony shows that in order to vary the grade outlet for the different sized fruits, that the adjustable member was moved toward or from the opposing member just the same as in this case this roll was moved toward or from the carrier member so as to increase or decrease the outlet area. (Indicating on model on table.)

Mr. LYON.—Counsel is arguing this rather than stating it, because I can't agree that the witness says that is just the same as in this exhibit. He said it was like the drawings and as disclosed in the patent.

Mr. ACKER.—Of course, you knew, Mr. Lyon, that I was simply directing the Court's attention.

[327]

Mr. LYON.—Well, your record there when you read it will look the other way.

Mr. ACKER.—I think, rather than to have interruptions and any misunderstanding, I shall read the deposition, if your Honor please.

The COURT.—All right.

(Mr. Acker thereupon read the deposition of Howard B. Stevens.)

The COURT.—Now, we will take an adjournment until tomorrow morning.

(Whereupon, at the hour of 4:30 P. M., an adjournment was taken until Thursday, July 13, 1916, at 10 o'clock A. M.) [328]

*In the District Court of the United States, for the  
Southern District of California, Southern  
Division, Ninth Circuit.*

Hon. OSCAR A. TRIPPET, Judge Presiding.

**A-44—EQUITY.**

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

**A-45—EQUITY.**

FRED STEBLER,

Plaintiff,

vs.

MID-CALIFORNIA CITRUS ASSOCIATION,  
Defendant.

**A-50—EQUITY.**

FRED STEBLER,

Plaintiff,

vs.

POTTERVILLE CITRUS ASSOCIATION,  
Defendant.

**Reporter's Transcript.**

Filed Aug. 8, 1916. Wm. M. Van Dyke, Clerk.  
By Chas. N. Williams, Deputy Clerk. [329]

Los Angeles, Cal., Thursday, July 13, 1916,  
10:20 A. M.

The COURT.—Stebler vs. Porterville Citrus Association. Proceed.

Mr. ACKER.—At the hour of adjournment yesterday afternoon, if your Honor please, I was engaged in reading the deposition that was taken at Citra, and I had finished reading the deposition of one of the witnesses.

The COURT.—Yes; proceed with the evidence.

Mr. ACKER.—And I might state to your Honor by stipulation entered into between counsel at the time of the taking of these depositions it was agreed that the deposition taken in one case would apply to the other cases; that is, to the case 45 and to the case of Stebler vs. Porterville Citrus Association brought under the Tom Strain Patent, so this deposition applies to all three of the cases. And in order that you may follow this deposition, I shall hand you the photo prints which were introduced in evidence and disclose this apparatus in use in the packing houses in Florida.

(Whereupon, Mr. Acker read the deposition of E. L. Wartmann.)

Now, those depositions, if your Honor please, I will not argue that point now, that will come in the argument, as to the bearing of those and the ma-

chines to which they relate, and the amount of fruit that was handled through those sizes.

The COURT.—No evidence to contradict that?

[331]

Mr. ACKER.—No evidence to contradict a word of that and no cross-examination of the witnesses.

**Testimony of John A. Milligan, for Defendants.**

JOHN A. MILLIGAN, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ACKER.)

Q. Mr. Milligan, you will please state your name, age, residence and occupation?

A. John A. Milligan; age, 56; residence, Porterville, California; I am secretary and manager of the Porterville Citrus Association.

Q. How long have you been engaged in the citrus industry, Mr. Milligan?

A. Since 1906-7, the winter of 1906-7.

Q. What profession or occupation did you follow prior to such time?

A. Minister in the Congregational Church.

Q. A duly ordained minister? A. Yes.

Q. Are you a member of the flock at the present time?

A. I am a member of the San Joaquin Valley Congregational Ministers Association.

Q. I understood you to state that you were the president at the present time of the Porterville Citrus Association, [332] one of the defendants to the present actions. A. That I am the president?

(Testimony of John A. Milligan.)

Q. Yes.

A. No, sir; I am secretary and manager.

Q. And did you hold that position during the year 1915?

A. No, sir. I held the position five years prior to 1914-15—1914, I believe, June, 1914, when I became secretary and manager.

Q. (By the COURT.) What were you prior to 1914-15?

A. I was president of the Porterville Citrus Association for, I think it was five or six years; I don't remember now.

Q. (By Mr. ACKER.) Mr. Milligan, will you please state whether or not an apparatus was installed by Mr. George D. Parker, of Riverside, California, in the packing-house of the Porterville Citrus Association for the sizing or grading of oranges, and when the said machine was installed.

A. There was a sizer installed last fall—last winter, the fore part of the winter in the house that the Porterville Citrus Association packs fruit in in Porterville, California.

Q. Can you state what time during the fall of the year?

A. I don't remember just the exact time when they began work, but the installation was completed just a day or two before we began our packing-house operations; that is, the final work in the equipment.

Q. You are the John A. Milligan who gave an affidavit in this case for use in connection with the preliminary in [333] junction proceedings?

(Testimony of John A. Milligan.)

A. Yes, sir.

Q. This is the affidavit—

Mr. LYON.—Now, I object, your Honor, on the ground that it is incompetent and not proper procedure. It is an *ex parte* affidavit this party made on behalf of the defendant in this case and could be offered here solely for the purpose of impeachment; nothing else.

The COURT.—What is the purpose?

Mr. ACKER.—This is an affidavit, your Honor, under the rules on file in this court.

The COURT.—Sir?

Mr. ACKER.—This is an affidavit in rebuttal of the affidavits placed on file in this case by the complainant on a motion for a preliminary injunction; it forms a part of the records of this case.

The COURT.—I don't understand we are trying a question of preliminary injunction now. We are trying the case on the merits. They have not introduced any affidavits in evidence. I don't understand that you are relying on any affidavits on file?

Mr. ACKER.—Not at all.

Mr. LYON.—I did not understand that we were permitted to use any *ex parte* affidavits even if they were on file. This is a trial of the case on the merits and not a motion for temporary injunction. We have not offered in evidence or attempted to offer in evidence any of the *ex parte* affidavits. [334]

The COURT.—I don't see the materiality of it, Mr. Acker.

Q. (By Mr. ACKER.) You did give an affidavit

(Testimony of John A. Milligan.)

in connection with the motion for preliminary injunction in this case, did you not? A. Yes, sir.

Q. And the facts set forth in that affidavit were verified by you prior to giving the affidavit?

Mr. LYON.—Just a moment. We object to that question as leading and as calling for a conclusion.

The COURT.—The objection will be sustained.

Mr. ACKER.—Exception.

Q. Mr. Milligan, can you state when the packing-house started into operation for the sizing and packing of fruit in this season of 1915-16?

A. Yes, sir; we packed our first car of fruit on November 20th.

Q. November 20th? A. Yes, sir.

Q. Was November 20th the time at which the packing-house started in operation? A. Yes, sir.

Q. Now, can you state how long before the packing-house started its operation that these machines were installed for the Porterville Citrus Association, and by machines I mean the ones involved in this controversy. [335].

A. Well, just two or three days before; in fact, the final work on the transmission was not completed until the day we started.

Q. I direct your attention, Mr. Milligan, to a series of photographs which have been introduced in evidence on behalf of the complainant, and ask whether they correctly represent the machine as installed in your packing-house, or the packing-house of the defendants, and as placed into operation by said association?

(Testimony of John A. Milligan.)

The COURT.—These photographs were taken November 12th, were they not?

Mr. ACKER.—Yes.

Q. (By the COURT.) When did you say you started up? A. The 20th.

Q. (By Mr. ACKER.) I direct your attention more particularly to the print marked Plaintiff's Exhibit 5.

Q. (By the COURT.) What changes were made in those machines from the time those photographs were taken until the packing-house started in operation?

Mr. ACKER.—I wish to know whether the machines were in that condition at the time they were installed in the house of the Porterville Citrus Association and placed in use.

The COURT.—On November 20th?

Mr. ACKER.—On November 20th.

The COURT.—Yes. [336]

A. No, sir; they were not, and never in operation in that position.

Q. (By Mr. ACKER.) Please state for the benefit of the Court whether in the machines as installed for the Porterville Citrus Association and as used by the Porterville Citrus Association in connection with the sizing of the fruit, whether or not in the said machine there were incorporated therein and formed a part thereof independently adjustable rollers.

Mr. LYON.—That is objected to as leading and calling for a conclusion of the witness, and not for a

(Testimony of John A. Milligan.)

statement of facts, and incompetent and not the best evidence.

The COURT.—It looks to me like, Mr. Acker, it is a conclusion of the witness, asking for an opinion of the witness.

Q. (By Mr. ACKER.) Mr. Milligan, please describe the construction and operation of the rotary wall member of the fruit run-way of the sizer installed for the Porterville Citrus Association and used by the said association for the sizing of its fruit.

A. The construction of the roller system, as I understand you have reference to, is a complete alignment of the roller system from one end of the machine to the other, and not adjustable at the opening ends.

Q. (By the COURT.) You mean by the "openings" where the fruit goes out? A. Yes, sir. [337]

Q. (By Mr. ACKER.) Were the rollers adjustable at any portion of the length of the roller section; that is, the roller members?

A. No, sir; not as far as operation is concerned. They may have been when they installed them, but I don't know of them; no use in the operation.

Q. Please state whether or not during the operation of the said machine your company varied the position of the roller member of the sizing portions of the rotary-wall section during the operation of the machines for varying the size of the outlet openings for the fruit to be sized?

Mr. LYON.—That is objected to; no foundation laid; the witness not having qualified to answer the

(Testimony of John A. Milligan.)  
question, and leading.

The COURT.—Objection overruled.

Mr. LYON.—Note an exception.

Q. (By the COURT.) Did you change these rollers while you were operating it?

A. No, sir, never.

Q. Then from November 20th down to the present time they have not been changed? The adjustment has not been changed?

A. No, sir; there was an attempt made by a certain individual to change the adjustment on one for a certain purpose; that is all I know of.

Q. (By Mr. ACKER.) You say an attempt was made by an individual to change it. What do you mean by your last [338] answer?

A. Well, at the time the Court met in our packing-house, a party to this suit, as I understand it, attempted to show by forcing the riveted connections that it was possible to make an adjustment on an independent roller; that is the only time they have ever been touched.

Q. What have you to say as to the possibility of making any such adjustments with the machine as installed and put into operation in your packing-house?

Mr. LYON.—That is objected to as incompetent.

The COURT.—I don't know; if this man is a mechanic, he can testify as to that, Mr. Acker.

Q. (By Mr. ACKER.) You are familiar with the construction and operation of the machines used by the defendants, are you not, Mr. Milligan?

(Testimony of John A. Milligan.)

A. Yes, sir.

Q. Please state whether or not there was employed in the said machine chutes or run-ways for guiding the fruit from the discharge outlets for the sized fruit to bins for the reception of fruit.

Mr. LYON.—That is objected to as calling for the conclusion of the witness and leading, incompetent, and not the best evidence.

The COURT.—I think that is asking for an opinion as to whether these things are chutes or not.

Mr. ACKER.—Well, if your Honor please, I am asking [339] if there were any means—I will modify the question in this way:

Q. What means, if any, were arranged transversely of the traveling belt in the machine used by the defendant and installed at the time you have testified to for conveying the fruit from the discharge outlets to the fruit-receiving bins?

Mr. LYON.—Now, that is objected to as leading and calling for a conclusion; the witness ought to be first asked to describe that portion of the machine, at least, before his attention is directed particularly to an opportunity for denial of the existence of a thing.

The COURT.—Objection overruled.

Mr. LYON.—Note an exception.

A. State your question again.

(Last question read by the reporter.)

A. None whatever; the delivery of the fruit is directly into the bin.

Q. (By Mr. ACKER.) Please state whether or

(Testimony of John A. Milligan.)

not in the machine as installed in your packing-house and as used by the defendant company, whether the bins for receiving the sized fruit extended beyond the sizing or grading member of the said apparatus.

Mr. LYON.—That is objected to as leading, calling for a conclusion of the witness, and not a statement of fact, and incompetent, and not the best evidence.

The COURT.—Please read the question, Mr. Reporter. I [340] don't know whether I understand Mr. Acker very well.

(Last question read by the reporter.)

The COURT.—Objection overruled.

Mr. LYON.—Note an exception.

A. No, sir; they do not extend beyond the sizing apparatus.

The COURT.—Now, let me see if I can't separate that.

Q. The box or bins to receive the fruit, are they longer than these rollers? A. No, sir.

The COURT.—That is the question, isn't it?

Mr. ACKER.—That is the question.

Q. Are you familiar with the sizing and distributing apparatus placed on the market by the complainant, Fred Stebler? A. Yes, sir.

Q. Have you one of those devices in use in your packing-house? A. Yes, sir.

Q. Please state how the length of the grader member, or the rotary member of the sizer compares in length with the length of the bins for receiving the fruit.

(Testimony of John A. Milligan.)

A. I couldn't give you the exact proportion of the distance, but approximately it is about half way, or a trifle over half way of the bin surface.

Q. That is, the grader is approximately one-half of the length of the bin surface? [341]

A. Yes, sir.

Q. Now, in the use of that device, how is the fruit carried from the grader member—grader or sizer member to the bins which are located beyond the grader, or a distance of approximately one-half beyond the grader?

A. By a system of adjustable telescope chutes crossing a movable belt.

Q. How does the fruit, which is discharged in the machine used by the defendant and charged herein to be an infringement, flow from the discharge outlet for sized fruit to the receiving bin?

A. It flows directly into the bins, unless it was obstructed, of course, but it flows directly into the bin.

Q. How does it flow? What causes it to flow?

A. The gravity.

Q. That is, it rolls down by gravity?

A. It rolls down by gravity; yes, sir.

Q. What have you to say regarding the sizing and distributing apparatus which you have in your house and installed therein by the complainant, Fred Stebler, compared with the discharge of the fruit in the machine alleged to be an infringement?

A. That end sizer with its bin system toward the sorting tables, the delivery is practically direct; it

(Testimony of John A. Milligan.)

varies a little, but toward the end, of course, it flows [342] into these channels or chutes and is carried on the surface by this gravity to the bins that are desired to be used for it.

Q. It has been stated by the witnesses produced on behalf of complainant that there was a barrier or barrier pieces incorporated in the defendants' machine. Please state the purpose and function of those barrier plates.

Mr. LYON.—I don't know as the question is definite enough to identify what the witness is interrogated in regard to.

The COURT.—Well, we will find out. Objection overruled.

A. The use that is made of the slats—we call them slats in our house—is simply that when the fruit falls directly from the sizing aperture into the bin, if we have an excess of sizes, any given size calling for a larger bin, the slat is placed parallel to the moving belt, one belt moving one way and the other the other; the slat will be placed in the middle groove so as to distribute the fruit into the bin for which the aperture is made.

Q. (By the COURT.) Awhile ago you said the fruit flowed directly into the bin.

A. I said it flowed directly into the bin; you could obstruct it from flowing directly into the bin; you could put that slat and that would prevent it from flowing directly into the bin. [343]

Q. (By Mr. ACKER.) What would be the object of varying the discharge of the fruit from one end

(Testimony of John A. Milligan.)  
of the bin to the other end?

A. That, of course, is simply to secure bin capacity so as to allow a larger number of packers to get around the bin.

The COURT.—I understood your question just as he has understood it.

Q. (By Mr. ACKER.) Mr. Milligan, does the fruit as it flows by gravity into the bin discharge at any given point relative to the bin?

A. Yes; it has to if it flows into the bin at all, it has to flow into a given point.

Q. Now, are these barriers or slats which you have referred to, used at all times in connection with the defendants' device during the operation of sizing fruit? A. Oh, no, sir.

Q. And when are they brought into operation?

A. Well, only as needed, in case of enlarging a bin. For instance, as our 26 size this last year ran heavily, the slats were used only in that instance, or wherever in any bin it was necessary where the bin was enlarged to place the obstruction to distribute properly in the one bin.

Q. That is, to even up the flow of the fruit throughout the bin? A. Yes, sir. [344]

Q. (By the COURT.) You get the same depth of fruit in the bin all over the bottom of the bin; is that the idea of it?

A. Yes; it is to distribute it, to enlarge the bin from two feet or three feet to six feet or seven feet or eight feet, to get the packers around to get the packing space. These slats will enable the fruit to fall

(Testimony of John A. Milligan.)

which way you want into that one bin, instead of directly to that one point, and then form a V-shape—

Q. If it was not for these slats the fruit would pyramid into these bins? A. Yes.

Q. And form a pyramid?

A. If the packers didn't keep it down; yes, sir.

Q. Then you use these slats in order to make it distribute evenly so there will be the same depth of oranges all the way through the box?

A. And obviate the necessity of a man spreading them down by hand.

The COURT.—I think we understand that. There is no conflict of ideas about that.

Mr. ACKER.—No conflict of ideas so far as I am concerned; that is my understanding, to even off or level up the fruit in the bin.

The COURT.—Is that your understanding, Mr. Lyon?

Mr. LYON.—Mr. Milligan also says they adjust the length of the bins from two to— [345]

The COURT.—He has settled that. They make a three-foot bin six feet if they want.

Mr. LYON.—And by these barriers may deliver the fruit from a given opening to any spot in the bin. I don't think there is any dispute in regard to that.

The COURT.—Well, we don't need to waste time on that question.

Q. (By Mr. ACKER.) Was your company a party to the suit instituted by Mr. Fred Stebler against the Pioneer Fruit Company?

Mr. LYON.—It is not claimed that he was.

(Testimony of John A. Milligan.)

Mr. ACKER.—One minute, Mr. Lyon. I simply want to take the testimony.

A. No, sir; we were not.

Q. During the course of the examination of Mr. Fred Stebler he was asked by his counsel the following questions and his answers I read to you. (Reading:) "Q. Subject to that judgment"—meaning the judgment against the Pioneer Fruit Company—"did you settle with the Porterville Citrus Association for the use of any of the type of machines that were covered by that judgment? A. I did.

Q. What machines? A. Machines that they were using in their Plano house. Q. And they took a license for the two or three machines that the Porterville Citrus Association was using in their Plano house? A. Well, since I come to think about it, I think there was another house involved in that, [346] which was the Boydston house, which was also involved in that settlement. Q. And they paid \$188.50 damages on each machine? A. Yes, sir. Q. And in that contract they agreed to the validity of both the Stebler Distributing Apparatus Patent, Plaintiff's Exhibit No. 2, and the Strain Reissue Patent, Plaintiff's Exhibit No. 1, claims 1 and 10? A. I believe so. Q. And agreed at no time to further infringe? A. I believe that was part of the basis of the settlement." I will ask you, Mr. Milligan, what you have to say regarding the correctness of that testimony, or the incorrectness thereof.

A. With regard to the Porterville Citrus Association, I have no knowledge of any such agreement

(Testimony of John A. Milligan.) ever having been entered into or signed by its officers; I couldn't say on oath that such has not been done, but not to my knowledge.

Q. And to your knowledge did the Porterville Citrus Association ever admit the validity of any patent owned or controlled by the complainant, Fred Stebler?

Mr. LYON.—That is objected to as leading and incompetent; the witness has already said he had no knowledge on the subject whatever.

The COURT.—Objection overruled.

Mr. LYON.—Note an exception.

A. What is the question?

(Last question read by the reporter.)

A. No, sir; not to my knowledge, they never did.

[347]

Q. (By Mr. ACKER.) Please state in what manner the grading outlets for fruit to be sized in the defendants' machine are changed or altered for the purpose of varying the same for a different size of fruit.

Mr. LYON.—That is objected to as incompetent; no foundation laid; the witness not having qualified to answer the question.

The COURT.—Read the question.

(Last question read by the reporter.)

The COURT.—Objection overruled.

Mr. LYON.—Note an exception.

A. The adjustment at the aperture for sizing is made with a metal plate under the belt that is adjustable up and down.

(Testimony of John A. Milligan.)

Q. (By Mr. ACKER.) Is that plate a hinged plate?

Mr. LYON.—I object to that form of the question as leading. Let the witness describe what it is.

The COURT.—Well, I think it is leading, but I will overrule the objection.

A. No, sir; it is not hinged; it is on the same level with the belt but it is underneath, but the idea is that there is no hinged proposition, but it is directly under the belt and it is raised or lowered according to the desired change in the size.

Q. (By Mr. ACKER.) You are familiar with the construction and operation of the complainant's machine—sizing and distributing system as installed—[348]

The COURT.—Of the Stebler machine?

Q. (By Mr. ACKER.) (Continuing.) of the Stebler machine as installed and operated in your house? A. Yes, sir.

Q. Now, I wish to ask, Mr. Milligan, what would be the result in the operation of that machine if the strips forming the guide chutes were removed?

A. Well, the result would be that the machine would be practically useless; it could not be—it would be of no value, practically no value for that purpose. The guide chutes across the movement of the belt is the principal feature of the system to get the efficiency of the machine.

Mr. ACKER.—Take the witness, Mr. Lyon.

(Testimony of John A. Milligan.)

Cross-examination.

(By Mr. LYON.)

Q. You never saw a Stebler grader then without the distributing system and the telescoping chutes?

Mr. ACKER.—The question is objected, if your Honor please, inasmuch as the device to which the question applies must be the device of the patent in suit.

The COURT.—I will overrule the objection.

A. What is the question again?

(Last question read by the reporter.)

A. Not that I know of. You mean the latest constructed—

Q. (By Mr. LYON.) I said the Stebler grader, you know [349] what the Stebler grader is, don't you? A. Yes, sir.

Q. Now, have you ever seen that used without the distributing belt and the chutes along the side of it?

Mr. ACKER.—Have you reference, Mr. Lyon, to the Stebler sizer and distributor which the witness has testified to as having been used in this packing-house?

Mr. LYON.—The witness understands what I refer to, and that is the grader.

The COURT.—I will overrule the objection.

Mr. ACKER.—I am not making an objection. I simply want the record clear.

Q. (By Mr. LYON.) I am referring to the grader proper now, Mr. Milligan, and you so understand it, and I am asking you if you have ever seen

(Testimony of John A. Milligan.)

that grader used without the distributing belt and the chutes. A. No, sir; I have not.

Q. Never have seen it? A. No, sir.

Q. Don't you know whether it would be practical without the distributing belt or the chutes?

A. No.

Q. You don't know whether with simply the bins arranged stationary at the side and below, the grader would be practical?

A. No; because it would cut it— [350]

Q. I ask you if you have ever seen it used that way. A. I told you I did not.

Mr. LYON.—Then we move to strike the testimony of the witness from the record in regard to whether the Stebler grader and distributing apparatus would be practical without the chutes, on the ground that the witness is not qualified to answer the question.

The COURT.—Motion denied.

Mr. LYON.—Exception.

The COURT.—It will go to the weight of his testimony.

Q. (By Mr. LYON.) Who in the employ of the Porterville Citrus Association has charge of the grading operation? In other words, the use of the grading machines?

A. Which grading machines do you mean?

Q. All of them that are in the packing-house there.

A. Which packing-house?

Q. The Porterville Citrus Association.

A. The Porterville Packing House Company?

(Testimony of John A. Milligan.)

Q. Who is the man that is in charge of operating that grading and was this past season?

A. Who was the foreman?

Q. Yes.

A. This past season and the season before, Mr. N. Ofstadt.

Q. You paid very little attention to the mechanical operations of the machines during the past season, did you? [351]

A. I paid very close attention to them.

Q. How long since you have examined the three machines installed in the Porterville Citrus Association packing-house at Porterville to ascertain whether D or any of the nuts D', as shown in Plaintiff's Exhibit 4 have been turned with any degree, whatever, since the ends of the bolts were riveted?

A. Now, read the question.

(Last question read by the reporter.)

A. These two machines—there were only two machines in the house. The examination was made before the acceptance of the machinery at the time of installation, and they were moved then and riveted in the same position in which they are now; I am in the house every day.

Q. You have never examined any of those bolts since then to see whether any of them have been turned since they were riveted down?

A. Yes; I examined one of them.

Q. Only one?

A. Yes; that was the one you moved.

(Testimony of John A. Milligan.)

Q. Have you made any particular examination of those nuts since that time?

A. Yes; I have looked at them all, as far as that goes, in the whole machine.

Q. When? That day?

A. Yes, that day; I examined the one after you were there that day to see how much you moved it.

[352]

Q. You haven't examined any of those nuts?

A. Yes; in a general way. What would be the object of my going and examining a nut; they would think I was nutty.

Q. In 1910, what was the relation of the Porterville Citrus Association with the Plano Packing-House Company, in 1910 and '11?

A. The relationship of the Porterville Association, or rather, the relationship of the Plano Packing-House Company to the Porterville Citrus Association would be the proper way to put it, was simply this: The group of growers, forming the Porterville Packing-House Company, furnishing the packing-house and equipment, leased their building and equipment to the Porterville Citrus Association for use in packing fruit.

Q. And in the summer of 1911 you, as an officer of the Porterville Citrus Association, settled with Mr. Stebler for the use of a grader and distributing system which has been placed in the Plano house by the H. K. Miller Manufacturing Company?

Mr. ACKER.—That question is objected to as incompetent, irrelevant and immaterial.

(Testimony of John A. Milligan.)

The COURT.—Objection overruled.

A. I will be glad to acknowledge my own signature if it is on any paper.

Q. (By Mr. LYON.) Do you remember any of the circumstances in connection with that? [353]

A. Do you wish to know them?

The COURT.—The settlement might be oral without being in writing.

A. Well, if you wish me to give the details, I will.

Q. (By Mr. LYON.) I ask you if you remember anything about it at all, first. A. Sure.

Q. Now, tell us the facts as you remember in regard to that settlement.

A. If the Judge wishes me to give the statement.

Mr. ACKER.—Yes; go ahead.

A. As far as I know in regard to that matter, the Plano Packing-House Company that we encouraged in the work of the association, because we wished to continue their relationship to us as an association, we encouraged them in their plan of building a house and equipping it. The equipment was furnished by Miller and MacIntosh. The work was done entirely outside of my supervision, for I was not at that time connected with the management only as an officer—yes, I think I was at that time president of the board. Mr. Kennedy was the manager, and he conducted the business, and I know this about it, however, that we paid no royalty or penalty to Mr. Stebler, that we were protected by Mr. Miller and MacIntosh, and they took care of that for us.

(Testimony of John A. Milligan.)

Q. (By Mr. LYON.) You are very positive you didn't write any letter to Lyon & Hackley, or Frederick S. Lyon, [354] or Mr. Stebler, or the California Iron Works, in regard to a settlement, and didn't pay any money in settlement at that time?

A. As far as I know, Mr. Lyon; I don't know.

Mr. LYON.—I will ask, in view of the surprise to this witness—I didn't see him in attendance yesterday, that the further cross-examination be deferred until the afternoon session. Otherwise, except on this fact, I don't care for the further cross-examination. I have some records in the office, and I want to confront the witness with them.

Mr. ACKER.—I understand, Mr. Lyon, the cross-examination is completed, except as to these letters?

Mr. LYON.—Letters or other documents.

The COURT.—We will take a recess until 11:30.

(Recess.)

(After recess.)

**Testimony of Thomas Strain, Jr., for Defendants.**

THOMAS STRAIN, Jr., a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. ACKER.)

Q. Please state your name, age, residence and occupation.

A. Thomas Strain; I am field manager for the Mutual Orange Distributors.

Q. How long have you been identified with the

(Testimony of Thomas Strain, Jr.)  
citrus industry, Mr. Strain? [355]

A. Practically all my life, for the last 22 years working in that line.

Q. I will hand you copies of letters patent which have been introduced in evidence as Complainant's Exhibit No. 3 and ask you whether you are the Thomas Strain to whom said letters patent were issued? A. No; it was my father.

Q. Can you state whether or not a machine was ever built in accordance with the invention of your father, Thomas Strain?

Mr. LYON.—That is objected to as calling for a conclusion of the witness; it is not shown that he has ever read or is familiar with this patent in any manner, or understands it, or is capable of so doing.

Q. (By Mr. ACKER.) Mr. Strain, are you familiar with the device disclosed by the said letters patent?

A. Will you repeat the question, please?

(Last question read by the reporter.)

A. I would like to look at the patent. (Receiving patent and examining the same.) Yes; I am.

Q. Please state the extent of your familiarity with that device.

A. I was working with my father at the time the grader was built and helped build it.

Q. You helped to build the grader of this invention?

A. I helped to build that machine. [356]

Q. And when? What time?

A. It was, I believe, in 1902; the year 1901 or '2.

(Testimony of Thomas Strain, Jr.)

Q. And where was it built, Mr. Strain?

A. In Fullerton.

Q. Did you ever operate the machine after it was built?

A. I had charge of the machine as long as it was in operation.

Q. How long was it in operation?

A. We operated the machine two seasons.

Q. Can you state whether more than one machine was ever constructed or operated?

A. There was never more than one machine in use.

Q. What became of that machine?

A. It was torn down.

Q. Please describe it for the benefit of the Court, what means, if any, were employed in that machine for varying the discharge outlets for sized fruit?

A. There was a small movable stick about 1 by 2 and a piece fastened onto it at an angle to take the fruit off the belt. This was adjustable; you could put it up in part of the bin to take the fruit off.

Q. No; I think you misunderstood my question, Mr. Strain. My question was, what means, if any, were employed for varying the grade outlets for the fruit to be sized, the outlets leading from the fruit runway? [357]

A. There was a lever attached to an upright that run out with the shaft on the end, and to raise it, you raised the shaft from the belt by means of adjustment.

The COURT.—You spoke of this machine as being a grader. Some of these machines have been called sizers.

(Testimony of Thomas Strain, Jr.)

Mr. ACKER.—If your Honor please, in reality, the term "grader" as applied to these machines is a misnomer. These machines size the fruit into different sizes. Now, what we ordinarily term a grader, as used in these packing-houses, is to grade the fruit, and that is done at some point in the packing-house, and then that fruit is carried to the machine to be sized, so the term grader as used in this suit means one and the same thing, an apparatus for sizing the fruit.

Q. Please describe what constituted the rotary wall member of the said grader.

A. It was a three-quarter inch steel shaft.

Q. And what was the probable length of the said shaft? A. About 40 feet.

Q. And do I understand from your testimony it was that shaft which was raised and lowered?

Mr. LYON.—That is objected to as leading.

Mr. AKER.—Was there an objection to that question?

Mr. LYON.—I objected to the leading feature of it. Let the witness tell.

The COURT.—Objection overruled. [358]

A. The shaft was raised and lowered from the belt that traveled onward to give the different—to adjust the outlets for the fruit to pass through.

Q. (By Mr. ACKER.) Mr. Fred Stebler, the complainant in the present action, has testified in connection with that machine that means were employed for raising and lowering the longitudinally traveling belt. What have you to say relative to the

(Testimony of Thomas Strain, Jr.)

correctness or incorrectness of such testimony?

Mr. LYON.—That question is objected to because it is a misstatement of Mr. Stebler's testimony.

The COURT.—I don't like that method of examining the witness, putting one witness up against another, Mr. Acker. Ask the question without referring to Mr. Stebler's testimony.

Q. (By Mr. ACKER.) What means, if any, were employed in that machine for raising and lowering the longitudinally traveling belt?

A. There was none.

Q. Were there any means employed in that machine for adjusting the belt vertically with respect to the rotating sizing or grading rod of the apparatus?

A. No.

Q. What means, if any, were employed in the said machine for controling the distribution of the sized fruit relative to the fruit receiving bins?

A. There was small pieces of wood about 1 by 2, with [359] an angling piece to draw the fruit off the belt, and that was adjustable, could be moved from one part of the bin to another to evenly fill the bins. [360]

Q. Was that adjustable longitudinally?

A. Longitudinally.

Q. What was the purpose of that adjustable piece?

A. It was to fill the bins evenly, and to distribute the fruit from one part of the bin to another.

Q. Can you say whether or not it would serve to prevent the fruit pyramiding in the bin?

A. It would not prevent it from pyramiding it in

(Testimony of Thomas Strain, Jr.)

the bin, but when you did get one pyramid, you could move this and fill the vacant part of the bin, and in that way get your bins filled all over.

Q. That is, it would even up the distribution of the fruit within the bins? A. Yes.

Q. Could you, or could you not, by said means vary the distribution of the fruit from one bin to an adjacent bin? A. You could.

Q. How was that variation made?

A. By moving this apparatus that took the fruit off the edge of the belt along to some other point in the bin, or to the next bin.

Q. With the letters patent before you, and directing your attention more particularly to figures 6 and 11, and also figure 3 of the said letters patent, can you point out the part which you have referred to, and by means of which you state the distribution of the fruit could be varied relative [361] to the bin?

A. I will have to get this thing around so I will know what end of it I have.

Q. (By the COURT.) What is it that causes the fruit to be distributed in the bins shown in the picture or drawing?

A. I don't know which these are by numbers, but it is this little apparatus on the side here. It is this right here (indicating to the Court).

Q. This one (indicating)?

A. Yes; this right in here is movable (indicating).

Q. (By Mr. ACKER.) You mean this part marked 36-A?

The COURT.—What exhibit have you got?

(Testimony of Thomas Strain, Jr.)

Mr. ACKER.—The Thomas Strain, Complainant's Exhibit Number 3. You will find it in figure 11 of the drawing, 36-A.

Mr. LYON.—I would suggest you allow the witness to tell us this thing. There is the part 36, and the part 36-B, and let him pick it out, as to what it is. Let us see if he knows anything about it.

A. In this drawing here, I would say 36-B—is that B or A—that is B here.

The COURT.—That is B. A. 36-B.

Q. (By Mr. ACKER.) That piece, I understand you to say, was longitudinally adjustable relative to the traveling belt? A. It was.

Q. And I understand you to say that is the piece which [362] you refer to in your testimony as directing the point of discharge of the fruit relative to the bins? A. Yes.

Q. When did you say that machine was built and installed in the packing-house?

A. I believe it was in 1901-2 that it was operated, or thereabouts; I wouldn't say the exact date.

Q. (By the COURT.) 1901 and '2?

A. Yes; along in there. I could—I just got to take it from memory back of this time; along in there.

Q. (By Mr. ACKER.) Can you state whether or not more than one of said machines was ever built?

A. No; there was never more than one machine built.

Q. And that is the machine?

A. That is the machine.

Q. And that was the first machine that was built?

(Testimony of Thomas Strain, Jr.)

A. The first machine and the only machine that was built.

Mr. ACKER.—Take the witness, Mr. Lyon.

Cross-examination.

(By Mr. LYON.)

Q. Are you prepared to state that machine was not first operated in the spring of 1903, and that its second season was not 1904?

A. To the best of my recollection it was about 1902, and I am taking that from memory.

Q. Now, you are a cousin of Robert Strain, are you? [363] A. I am.

Q. And it was after he built his machine in the Benchley packing-house that this one was built, was it? A. I couldn't say.

Q. You don't remember anything about that?

A. I remember that he built a grader in the Benchley packing-house.

Q. You don't know whether this machine like Plaintiff's Exhibit 3 then was built before or after the one that he built in the Benchley packing-house?

A. No; I couldn't say.

Q. Now, did you have any knowledge at all of the making of the drawings for this application for this patent, Plaintiff's Exhibit Number 3?

A. Read the question, please.

(Last question read by the reporter.)

A. I saw the drawings as they were being made.

Q. They were made by a draftsman right from the machine and there in Fullerton?

A. What was that?

(Last question read by the reporter.)

(Testimony of Thomas Strain, Jr.)

A. I don't know.

Q. Well, where was it that you saw the drawings when they were made then?

A. By saying I saw them as they were being made, I mean that at different times when the drawings were presented to [364] my father, he would get them—he got the drawings—my recollection is they were made in Los Angeles here somewhere; I don't know who made the drawings.

Q. Were you present when your father showed that machine to Mr. George T. Hackley and Mr. Edmond A. Strause, for the purpose of making these drawings, and for the purpose of preparing this application for patent? A. I was.

Q. And that was down at the packing-house at Fullerton, wasn't it?

A. They were in the packing-house at Fullerton.

Q. And the application was signed by your father to cover the machine as it was being installed at that time? A. Read the question, please.

(Last question read by the reporter.)

A. I don't know; I suppose it was.

Q. And you saw those drawings at Fullerton on more than one occasion, you say?

A. There was different times the drawings were looked at.

Q. Now, have you any personal knowledge as to why the use of this particular machine was discontinued by your father? A. I have.

Q. That was because it was claimed by Mr. Stebler to infringe the Ish patent, and after the suit of Steb-

(Testimony of Thomas Strain, Jr.)

ler and Gamble against the H. K. Miller Manufacturing Company had been decided in Mr. Stebler's favor, wasn't it? [365]

Mr. ACKER.—The question is objected to as incompetent, irrelevant and immaterial; I don't see that is proper cross-examination. There was no reference to any suits on direct examination of this witness.

Mr. LYON.—I simply want to show—

The COURT.—It would go to show the date and the information this man had in regard to this machine. You asked him where it was discontinued. I will overrule the objection.

(Last question read by the reporter.)

A. It was because Mr. Stebler said it was an infringement on the Ish patent; the rest of the question I couldn't say.

Q. (By Mr. LYON.) And you were still with your father in that packing-house when immediately on us discontinuing the use of this machine he commenced making another grader in which the belts ran flat and had little cross-belts running across to take off the fruit, weren't you?

Mr. ACKER.—I object to that as incompetent, irrelevant and immaterial, if your Honor please, and not proper cross-examination.

The COURT.—Objection overruled.

A. I was.

Q. (By Mr. LYON.) Now, Mr. Strain, you refer to figure 6 of Plaintiff's Exhibit 3; isn't it a fact that in this machine, as constructed by your father and

(Testimony of Thomas Strain, Jr.)

used in your father's packing-house, the part 36, which is near the grade rod 20 kept the fruit from coming out under the grade rod at that [366] portion? (Indicating on the patent to the witness.) I see you hesitate. Are you sufficiently familiar with mechanical drawings to really understand this drawing?

A. This is a view down on this drawing, I can't see how that piece in there—

Q. Look at figure 5.

A. No; it did not.

Q. You are sure it did not? A. Yes.

Q. That was the purpose of that portion?

The COURT.—What portion is it now?

Mr. LYON.—Figure 5.

The COURT.—I know, but what number?

Mr. LYON.—36. And here is the point right in the middle (indicating to the Court.)

A. I would like that question read over again, if it is permissible.

Q. (By Mr. LYON.) Take another look at it if you wish to.

The COURT.—What is the proposition, Mr. Lyon?

Mr. LYON.—Why, that upper horizontal portion of the part 36 did prevent, in the machine, the fruit from running under the grading rod and between the grading rod and the belt where that portion of that part 36 was located, so as to form a discharge outlet at the part 36, which bends down transversely of the belt.

(Testimony of Thomas Strain, Jr.)

The WITNESS.—No; I don't believe it did.  
[367]

Q. Are you prepared to say that you thoroughly understand these drawings?

A. Yes; I understand the drawings when I get to look over them and see the different parts there.

Q. Are you prepared to positively state that no portion of the bed upon which the belt moved was hinged? A. I am.

Q. Were you present at any time when your father gave the instructions to either Mr. George T. Hackley or Mr. Edmond A. Strause to show these hinged leaves or portions of the bed plate on which the belt ran, as illustrated in Fig. 7 of Plaintiff's Exhibit 3? (Exhibiting patent to the witness.)

A. Read the question, please.

(Last question read by the reporter.)

A. I might have been present, but I don't remember his giving those instructions.

Q. You have no recollection of that feature at all, have you?

The COURT.—I don't understand what you are talking about—figure 7?

(Mr. Lyon thereupon indicated to the Court on the copy of the patent.)

Q. (By Mr. LYON.) Then you have no personal knowledge of this leaf or adjustment of the grade openings by moving the belt toward or away from the grading rod? A. There was none. [368]

Q. I say, you have no knowledge of that being dis-

(Testimony of Thomas Strain, Jr.)  
cussed by your father at all?

A. I know it was discussed, but I know it never was used.

Q. With whom do you know it was discussed?

A. Well, he talked with me about it.

Q. When?

A. At the time we were operating the machine.

Q. And before you made the machine?

A. No; not before we made the machine, to the best of my recollection, but I know at the time we were operating it we were talking about that.

Q. Was that before or after these drawings for this application for patent had been seen by you the first time? A. I couldn't say.

Q. You have no recollection as to when it was then that that feature was first discussed between your father and yourself?

A. I couldn't say as to the time, but it was during the operation of the machine.

The COURT.—Mr. Lyon, I don't see the number 13 in this figure at all.

Mr. LYON.—The number 13 will appear only on Fig. IX, or 9, where it is described in detail. The figure 12 will refer to the table generally.

(Informal discussion at the bench.)

Mr. LYON.—That is all, Mr. Strain. [369]

The COURT.—Any redirect, Mr. Acker?

Mr. ACKER.—No, sir.

The COURT.—All right. We will take a recess then until 2 o'clock.

Whereupon an adjournment was taken until 2 o'clock P. M. [370]

(Testimony of John A. Milligan.)

AFTERNOON SESSION—2 o'clock P. M.

The COURT.—Call your next witness.

Mr. LYON.—Recall Mr. Milligan, and I will finish with him in just a moment.

**Testimony of John A. Milligan, for Defendants  
(Recalled).**

JOHN A. MILLIGAN, recalled.

Cross-examination (Resumed).

(By Mr. LYON.)

Q. Mr. Milligan, I show you letter dated Porterville, California, October 12, 1911, and ask you if that is your signature attached thereto (handing paper to witness). A. Yes, sir.

Q. You dictated that letter to the firm of Lyon & Hackley in reference to the settlement of the infringement by that company and the Plano Packing House Company, as referred to, did you?

A. Just a moment until I read the letter, if you please. (Reading letter.) Yes, sir; I wrote the letter in Mr. Kennedy's absence while he was there.

Q. And the facts as therein stated were true at that time?

A. As far as I know; there is nothing stated, to my point of view, that is definite.

Mr. LYON.—Oh, no. We offer it in evidence as Plaintiff's Exhibit 11.

Q. I also show you a postal card dated Porterville— [371]

The COURT.—Now, is that letter going to be read?

(Testimony of John A. Milligan.)

Mr. LYON.—Just a moment. I will read the two of them together.

The COURT.—You had better read it now.

Mr. LYON.—The letter exhibit 11 is as follows, letterhead of Porterville Citrus Association, dated Porterville, California, October 12th. (Reading:) "Lyon & Hackley,

Los Angeles, Calif.

Sirs: Your letter of the 9th inst. received. Our Manager Mr. Kennedy is at present in the south. In answering for him, I would say that your information concerning the Porterville Citrus Association being responsible for any infringement upon the rights of Mr. Stebler is in error. We have no machinery in our houses at Porterville that can be affected.

With regard to the Plano Packing House Co. and the Boydston House at Worth, in whose houses we pack fruit, if there is an infringement there, as evidently there is, the matter will be attended to at once. Nothing has been done here for the reason that the matter was in the hands of the attorneys at Los Angeles who were to effect a settlement.

Please let me know at once the basis of the satisfactory adjustment you propose. As we are to use the machinery of the Plano House we are interested of course to see that the thing is attended to promptly. [372]

Yours truly,

THE PORTERVILLE CITRUS ASS.  
JOHN A. MILLIGAN, Ast. Mgr."

(Testimony of John A. Milligan.)

Mr. ACKER.—That is not the letter relating to any machinery involved in this suit, is it, Mr. Lyon?

Mr. LYON.—No; that is a letter in regard to these 1910 and '11 machines, which as Mr. Stebler testified, were paid for and the license contract entered into by which they agreed to recognize the validity of the two patents, Plaintiff's Exhibits 1 and 2, and not to infringe thereon.

Q. Now, I show you a postal card dated Porterville, California, October 15, 1911. That is in your handwriting (handing postal card to the witness).

A. Just let me see. May I read it?

The COURT.—If it is in your handwriting, let him read it aloud, and then we will all know what it is.

A. Yes; it is.

Mr. LYON.—It reads as follows: "Lyon & Hackley, Los Angeles, Cal. Gentlemen: I interviewed a representative of the board of the Plano Packing House Co. today. He informed me that the amount due Stebler will be forwarded to you at once. Truly yours, Porterville Citrus Association, by J. A. Milligan."

We offer this card in evidence as Plaintiff's Exhibit 12.

Q. Do these cards refresh your recollection, Mr. Milligan, in regard to the fact that the sum of \$377 was paid in [373] settlement for those two machines?

A. Just to the extent that we did not pay any of it at all.

(Testimony of John A. Milligan.)

Q. You mean personally, or the Porterville Association as an association?

A. The Porterville Citrus Association did not pay it, only just as appears there. I transacted the business as an accommodation for the manager who was away.

Q. And the sum, however, of \$377 was paid so as to clear your company in the use of those machines?

A. I know nothing in regard to that definitely, no, sir.

Q. You have no personal knowledge of the matter any further than set forth in these letters and postal cards?

A. And the general situation, there was a suit on those things, that is all.

Mr. LYON.—That is all.

Redirect Examination.

(By Mr. ACKER.)

Q. Is or is not the Porterville Citrus Association identified with this Plano Company which was involved in the suit with Mr. Stebler?

A. There was no connection, whatever, as far as I know.

Mr. ACKER.—We move to strike from the record all evidence in regard to the so-called Plano suit which was involved, no identity of interests between the Porterville Citrus Association and the said house.

Q. (By Mr. LYON.) Well, during the time your Porterville Citrus [374] Association, as you stated

(Testimony of John A. Milligan.)  
in this letter, were leasing those two houses, weren't you? A. The date was in October?

Q. Yes.

A. That was only a prospective lease at that time.

Q. And you did lease them as a result of this settlement? A. No; nothing like that.

Q. This settlement was made so you could use those machines in those houses the succeeding season?

A. So far as we were concerned, we didn't know anything about the settlement of the suit on that basis. We rented the house the following season.

Mr. LYON.—We submit the motion on the record.

The COURT.—The motion will be denied.

Mr. LYON.—That is all, Mr. Milligan.

#### **Testimony of Charles F. Brookhart, for Defendants.**

CHARLES F. BROOKHART, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

##### **Direct Examination.**

(By Mr. ACKER.)

Q. Your age, residence and occupation, Mr. Brookhart?

A. Riverside; age is 41 years; occupation, machinist.

Q. Have you ever heretofore appeared in court as a witness? A. I have not.

Q. Where are you employed at the present time, Mr. [375] Brookhart?

(Testimony of Charles F. Brookhart.)

A. George D. Parker's machine works, Riverside, California.

Q. Are you familiar with the machine which was manufactured by Mr. Parker and installed by Mr. Parker for the defendant to the present action?

A. Yes, sir; I am familiar with that machine; I made the drawings for it and supervised the construction of it and saw it in operation.

The COURT.—A little louder, please.

A. I made the drawings of the machine and was superintendent of the construction of it, and was there after it was in operation, and saw it in operation.

Q. (By Mr. ACKER.) Please describe in your own language the construction of the rotary wall member which forms one of the parallel members of the fruit runway of the said machine?

A. The rotary wall member is composed of sections forming a continuous roll member from one end of the machine to the other, mounted on bearings, running by power applied to one end; it is in continuous rotation.

Q. Please state whether or not any provisions were made in connection with the said rotary wall member for flexing the same at points throughout its length, or for varying the position of any section thereof.

Mr. LYON.—That is objected to as leading and calling for the conclusion of the witness, and not for a statement of facts. The witness should be asked

(Testimony of Charles F. Brookhart.)

to explain that structure, [376] and not simply a yes or no question as to whether or not a certain provision was made for doing a certain thing.

The COURT.—It seems to me like the question is leading, Mr. Acker.

Q. (By Mr. ACKER.) Please explain the construction and operation of that rotary wall member relative to the traveling belt for conveying the fruit through the runway of the grader.

A. Well, this rotating wall member is composed of sections, and in each end of each section there is what we call a roller end. This roll end was what we call machined or finished to make or form what we call a bearing, and in this same plate there was a square hole cast, and in the bearing in support of this, which was also machined, on what we call a hub on each side. The bracket comes down and fastens onto the frame, and these rolls were mounted on these bearings and the square shaft was placed in there so as to connect up the two together and rotate the wall member, and this bracket was made in order to give quick and accurate alignment of the roll member in the initial setting up. There was slots cast in this bracket, and after the rotating wall member was lined up the bolts were riveted and made a permanent structure, so there could be no moving of the roll member, or no flexing of that member; no adjustment of that member by means of bolts.

Q. That is, do you mean to say that no adjustment could [377] be given to the rotating wall member after it had been aligned and secured in position?

(Testimony of Charles F. Brookhart.)

A. After it had been aligned up with the traveling member and secured in position, there was no adjustment made on that member.

Q. How was the grade openings or discharge outlets for the fruit changed or varied during the operation of the machine—adapted to operation on different sized fruit?

A. Well, underneath the traveling member, which was composed of a belt on an inclined table, there is a flat plate which is adjusted toward the roller member at right angles; that is, presents a square surface towards that, and that would be adjusted up and down to change the size of the grade opening of each section of the roll member.

Q. How did the fruit which was sized in the said sizing apparatus move or flow towards the receiving bins adapted to receive any given size fruit?

A. Well, the fruit flowed out of the fruit aperture in a direct line into the bins, but in order to prevent the fruit from piling up in any one point, there was what we call barrier boards interposed to change the point of discharge into the bin and spread the fruit over the bin so it would be even and not overflow on to the floor or on the table.

Q. Where were those barrier boards, as you have termed them, placed relative to the rotating wall member of the [378] fruit run-way.

A. The barrier boards were rotated on the lower table after the fruit was sized by the traveling member in the rotating wall member, and flowed out the aperture down across the table into the bins. These

(Testimony of Charles F. Brookhart.)

boards were placed parallel with that table along the belts to stop the flow of the fruit,—the downward flow, and it changed the point of discharge into the bin.

Q. Approximately what distance did the fruit travel after leaving the grade outlet before coming into contact with these barrier boards as you have termed them?

A. Well, it is about—let me see. I think the first barrier member was about 8 inches from the fruit apertures; there was a slot provided for about 2 inches from the fruit aperture.

Q. How would the sized fruit move or flow relative to the receiving bins if these barrier boards were not employed?

A. Flow directly into the bins by gravity into these bins.

Q. (By the COURT.) You say they would flow directly into the bin, the oranges would?

A. Yes, sir; they would flow right down the table—

Q. Isn't there two belts running down the outside after the oranges get through the sides of the belts?

A. Those belts do not have any effect, or carry the fruit. These tables are inclined at an angle. Unless some barrier is interposed to stop the flow—  
[379]

Q. These belts would not have any effect on the direction of the orange at all?

A. Well, practically none, unless there is some way of stopping the fruit on the belt before the fruit would carry.

(Testimony of Charles F. Brookhart.)

Q. (By Mr. ACKER.) How were these barrier boards arranged, transversely of these belts or longitudinally of the belts?

A. They were arranged longitudinally of the belts; there was no other way they could be used and perform the function for which they were intended.

Q. Can you state whether those barrier boards were employed during the normal working of the machine?

Mr. LYON.—That is objected to as incompetent, the witness not having qualified to answer the question. He has not stated how long he was there during the operation of the machine, or that he observed it any length of time.

The COURT.—That is a question of the weight of his testimony. Objection overruled.

Q. (By Mr. ACKER.) Are you familiar with the operation of these machines as employed for the sizing of the fruit?

A. I am; I was present in the Porterville Citrus Association and the Mid-California Company for a week at the different houses, so I saw the operation of the machine and I know how they perform.

Q. I will direct your attention to complainant's photo exhibit number 5, and more particularly to the left-hand portion of the said photograph, and ask you whether these [380] barrier boards are arranged therein in proper position, and as employed during the operation of the machine throughout the sizing of fruit.

Mr. LYON.—That is objected to as leading and

(Testimony of Charles F. Brookhart.)

calling for a conclusion of the witness, and not for a statement of fact.

The COURT.—Objection overruled.

Mr. LYON.—Exception.

A. No, sir; these are not placed correctly; none of them was placed in that position at any time I was in the house. If they were used at all, they were placed longitudinally with the belt.

Q. (By the COURT.) Now, these barrier boards, you say, they are for the purpose of distributing the oranges in the boxes?

A. For the purpose of spreading the fruit evenly in the bottom of the bin so they would not pile up.

Q. Well, they would operate to carry the fruit to the different boxes if put together end to end?

A. No, sir; because you can't run the fruit past the second-grade aperture without getting the fruit mixed.

Q. How is that?

A. You couldn't run the fruit from this particular grading opening past the next one without getting the fruit mixed; you would have to move your bin over to take care of that fruit; the bin boards are adjustable.

Q. That wouldn't be any reason why you couldn't if you [381] have—and you take the first opening under the roller where the fruit comes out?

A. Yes, sir.

Q. Now, couldn't you spread those cleats along so as to carry the fruit into the next box instead of falling directly down into the bin under that opening?

(Testimony of Charles F. Brookhart.)

A. You couldn't carry it any further than the next grade aperture, because the fruit would mix—

Q. I am not talking about whether it would mix or not. Couldn't you do it?

A. You could carry it beyond. You couldn't get any sizing. What I wanted to convey was that.

Q. Suppose you carried the fruit from that box to another one, then you could, couldn't you?

A. If you keep on down the line, you would not have any box left for your last grade.

Q. I see these boards from the picture—have you got 5 before you? A. Yes; I guess it is 5.

Q. Do you see number 4 on there, the figure 4—these boards that run across the belts? What is that projection up over the belt 4? There is a piece on those separating boards that runs up over the belt.

[382]

A. Oh, that is a—so the fruit won't run along that belt and get in the wrong bin. That just comes over the top of this belt. That particular belt runs in the opposite direction. At least, it runs toward the lower or tail end of the machine, and as the bins fill up, if they pile up on that belt, the belt just works the fruit along, and it follows it along the edge of that belt, and that projection is to prevent any fruit going over that bin board into the next bin.

Q. You say that belt runs toward the tail end of the machine. Don't it run toward the head?

A. What I mean by the tail end is where the fruit is delivered onto the grader.

Q. It runs toward where it is delivered on the head—that lower belt.

(Testimony of Charles F. Brookhart.)

A. The way this picture is taken, this is the head of the machine over there.

Q. Wait a minute. Don't refer to the picture. Does the outside belt run the same way as the belt between the rolls or the opposite direction?

A. I will have to explain further. We use both sides of the belt. The top of the belt is used to carry the culls back, and the lower part of that belt is used on the lower table, so the top of the belt runs in one direction and the lower in the opposite, but the top of the belt runs opposite to the belt; that member that forms the sorting roll, it [383] runs opposite to that, the top of it, and the lower one runs in the same general direction as that belt under the roller. Both the top and the bottom of the belt is utilized.

Q. Is this projection on these partitions in the bins extended up past the lower belt and onto the second belt? A. Well, I am not just—

Q. It seems to me so in the photograph.

A. The photograph seems to show that, but I am not just clear on that point.

Q. I notice on this photograph it is nailed to the ends of those partitions. Are those partitions fastened firmly in place?

A. You mean these partitions (indicating)?

Q. Yes; the ones in the bins.

A. Those parts that appear to be nails or bolts going through the bracket that supports the bin sides.

Q. Well, can you move those partitions and make the box larger and smaller?

A. Yes, sir; they can be moved.

(Testimony of Charles F. Brookhart.)

Q. How can you move them if they are supported in brackets by bolts there?

A. Well, what we call the bin boards or partitions don't touch that wall at all; there is a casting up underneath this table that moves in a slot, and that board can be slid along in that groove up under the table.

Q. The whole fastening of the board is under the belt? [384]

A. It is just a bracket casting that slides in a groove.

Q. Under the belt?

A. It is under this belt under the table, yes.

The COURT.—Proceed, Mr. Acker.

Q. (By Mr. ACKER.) What is the length of the bins in the said sizer relative to the sizing member thereof?

A. The bins are the same length as the sizer or the grader.

Q. Mr. Knight, a witness for complainant, when questioned relative to the slots which appear in the brackets on the said photographs, stated the only function for those slots would be to permit adjustment for the roller sections of the rotary wall member for the purpose of varying the position thereof. Will you please state whether that is the only function and the function for which those slots were made in said castings?

Mr. LYON.—The form of that question is objected to as leading and suggestive; calling for a conclusion of the witness.

(Testimony of Charles F. Brookhart.)

The COURT.—I don't understand the question, Mr. Acker. I don't know whether the witness does or not.

Mr. ACKER.—I will withdraw the question, if your Honor please.

Q. Please state the purpose of the slots which appear in the bracket castings which support at intervals the roller member of the sizer, said slots appearing—

The COURT.—Now, you can get at that by taking that [385] picture which is marked, where they are marked. It is exhibit 4, and they are marked D', the bolt and slot. That is what you are talking about?

Mr. ACKER.—That is correct, your Honor.

The COURT.—Now, what do you want to know about the bolt and slot?

Mr. ACKER.—I wanted to know as a mechanic, and one who helped to construct that machine, what was the purpose of the slot being made in that bracket?

A. The only purpose of this slot is maintained to get a quick alignment of the bearings to carry the roll sections. It is necessary that these bearings be lined up, or these bearings—the plate that goes in the end where it runs on this bracket bearing would bind that on the bearing, and cause it to cut and wear out, and these bearings must of necessity be in perfect alignment or the roll member will not operate freely, and to maintain that these holes are cast in the slot and the roll member is lined up. The bolts which hold

(Testimony of Charles F. Brookhart.)

these brackets are riveted over after they have attained their alignment so they could not be adjusted.

Q. And as I understand, that was to secure the initial adjustment or aligning of the roller—

A. The roll member with the lower traveling belt member.

Q. And after that additional alignment had been obtained, the bolts were riveted down, as I understand.

A. That is, the nuts were tightened up and the ends of [386] the bolts driven to make that a permanent installation.

Q. What is the purpose of riveting a bolt down onto a nut after a nut has been screwed up to secure a member in place?

A. The only purpose for riveting down is so it can't be loosened up or taken apart. If a man had intended to adjust that, he would have used a jamb nut on there so he could loosen that and tighten it up, and lock it with a jamb nut; that is common practice, and I think that is proven by the mechanical world, according to the great number of inventions that have been made to prevent devices from loosening up, those that are subject to jar or shock.

Q. Is it common practice in mechanics, when you wish to prevent parts from jarring from a set position to first tighten up a nut relative to the securing bolt and then rivet the bolt down onto the head?

Mr. LYON.—That is objected to as leading again.

The COURT.—Well, I think it is leading.

Mr. ACKER.—If your Honor please, that ques-

(Testimony of Charles F. Brookhart.)

tion was asked of Mr. Knight as an expert. Mr. Knight, as an expert, gave that as a definition in mechanics for preventing parts from vibrating or moving loose, and said that was the manner in which they could be prevented from doing that, and I want to know from this witness, as a mechanic, whether that is a common practice.

The COURT.—Well, the objection is overruled with that [387] understanding.

Mr. LYON.—Note an exception.

A. What was the question?

(Last question read by the reporter.)

A. No, sir; that is not common practice, and I have been at the business 25 years and it is new to me.

The COURT.—I don't know whether I understand this thing or not—these bolts—the nuts of these bolts were hammered, as I understand—is that right?

Mr. ACKER.—Hammered; riveted over; upset.

The COURT.—Yes; swell the head of it or the end of it. Now, what is it you are trying to show by this witness?

Mr. ACKER.—By this witness that after those bolts are upset or headed relative to the nut, which tightens up the adjacent parts, that it is impossible thereafter to vary the position of the nuts to permit of any adjustment of the parts relative to each other.

The COURT.—Well, this last question was not addressed to that. It was addressed to a common practice.

Mr. ACKER.—Mr. Knight, the expert for complainants, stated the common practice where you

(Testimony of Charles F. Brookhart.)

wished to hold two movable parts together and prevent them from moving or shifting, due to vibration of the action of the machine; that the common practice was to secure them together with a bolt or nut, and then upset or head or rivet over the bolt, and then afterwards loosen them up again if you wanted to [388] change the adjustment.

The COURT.—I understand.

Q. (By Mr. ACKER.) Mr. Brookhart, have you read and are you familiar with letters patent of the United States, number 527,953, Defendants' Exhibit I (handing copy of the patent to witness) ?

A. Yes, sir; I have read over this patent, and I am familiar with the construction of it.

Q. Please explain the construction of the device; what that device is for.

A. It is a fruit grader—a machine for grading fruit, composed of two parallel members extending longitudinally along the machine, and on these members the conveyor carries the fruit along these parallel members which operate—it is composed of an endless belt on each side. [389] The one on the inside is straight-lined and the one on the outside forms a series of varied openings to vary the size of the fruit, and they are carried around small pulleys on a vertical shaft, and between each of these pulleys are placed adjustable plates. By adjusting the end toward the opposing member and away from it, you change the size of the grade opening. Of course, there are suitable bins for receiving this fruit as it is sized, the regular means of delivering the

(Testimony of Charles F. Brookhart.)

fruit into the machines as far as fruit sizes are concerned.

Q. Please state whether those plates are independently adjustable relative to each other.

Mr. LYON.—That is objected to as leading. I object to counsel leading the witness.

The COURT.—I will overrule the objection. I don't like counsel to lead the witness. I think it depreciates the value of the testimony very much, but I overrule the objection.

A. I thought I said these plates were adjustable between the vertically mounted pulleys, but they are each one individually adjustable towards the opposing member, or away from it, in order to change the grade opening. I meant to say that; I thought when I said it was between the pulleys—of course I see it does not fill the bill, but they are independently adjustable toward the opposing members.

Q. (By the COURT.) Is that these plates under the belt that you are talking about? [390]

A. No; they are plates that support the traveling belt. They are adjustable in and out toward the opposing member for carrying the fruit along the side.

Q. (By Mr. ACKER.) Mr. Brookhart, have you prepared a model of that device? A. Yes, sir.

Q. Or have you a model?

A. We have a model.

Q. Can you produce that model? A. Yes, sir.

Q. Please do so. Please produce the model. Where is the model?

(Testimony of Charles F. Brookhart.)

A. It is just outside of the door.

Q. Get it please.

(The witness thereupon left the room and returned with the model.)

Q. From what did you prepare the model which you have produced, Mr. Brookhart?

A. We prepared it from the letters patent which we had showing the construction of the machine, modeled after the drawing found in the letters patent.

Q. Now, with this device before you, will you please explain the operation of the various parts and what constitutes the fruit run-way, and how fruit is propelled through the machine?

Mr. LYON.—Of course, it will be understood we reserve [391] the objection to the model as a model until we have had an opportunity to compare the model with the patent.

The COURT.—What model is this?

Mr. ACKER.—This is the Ellithorpe patent.

Q. Now, Mr. Brookhart, please explain the operation.

A. (Indicating on the model.) This is the fruit run-way. This is one opposing member. The straight member on one side—of course, we have only one shown, one side of the grading apparatus; as disclosed in the patent it has two, or it has four, in fact, or one above the other, but to show the operation of these run-ways and the adjustable plates, and how the carriers are mounted and the conveyor, why, we just show the one side. The fruit is fed in the

(Testimony of Charles F. Brookhart.)

hopper down this run-way, and these are traveling belts toward the end of the machine. The fruit is carried along here, if it does not come through this opening, then the next size larger, and the next size larger, on down. These plates can be adjusted toward the opposing member; in order to change the grading openings here, they are adjustable in the same way.

Q. When one of the plates is adjusted toward or from the opposing member of the run-way, what is produced by such adjustment?

A. It just makes this one aperture smaller. It does not affect any other part of it at all; it is individually adjusted. Each one of these bars makes the different size for [392] the fruit.

Q. That is, the fruit of a certain size, of the smaller size, will go through the first graded discharge outlet of the fruit run-way?

A. Yes, sir; that is the idea. [393]

Q. And the next larger size through the second?

A. The next larger size and on down.

Q. Now, when the fruit is passed through the grade aperture of a particular size, where does it go?

A. It drops into the bins that are provided for underneath the grade openings, or fruit apertures.

Q. Now, are any provisions made in the patent, or disclosed by the patent for any other form of a nonadjustable member of the fruit run-way?

A. I don't believe I understand just the question.

Q. What other means are disclosed by the Ellithorpe patent for forming a fruit run-way other than

(Testimony of Charles F. Brookhart.)

the two parallel plate members which you have disclosed by this model?

A. In the patent they disclose a roller and roll member which is mounted on one side and performs one side of the front run-way. Of course, the adjustment is the same way, from that roll member.

Q. Now, have you provided the model so you can introduce or place in working position the roller which you have referred to, disclosed by said patent?

A. Yes, sir; we have provided to take this one member off and put the roll member on.

Q. Please take that member off and put the roller member on.

(The witness thereupon made adjustments in the model.)

Q. Now, you have removed one member of the fruit run-way? [394] A. Yes, sir.

Q. Now, what would be the operation of the machine with the roller member substituted for the longitudinal plate member which you removed from the apparatus?

A. The roll members revolve opposite from the conveying member or belt and tends to carry the fruit down the run-way into the various grade openings. From the receiving end of the machine the fruit is sized by these same adjustments, which vary the fruit openings, and the size will drop through each—the first size, of course, drops through the first opening and the second through the second opening, and so on down the line.

Q. Now, what function does the rotating wall mem-

(Testimony of Charles F. Brookhart.)

ber perform in the device as you have now arranged it?

A. It would tend to keep the fruit from trying to force itself down through the two members; that is, it revolves away from it; otherwise it would have a tendency to pinch it.

Q. How does that function compare with the rotary wall member of the defendants' device?

A. It functions the same way; the action of the rotating roll is to prevent the fruit from pinching between the two sizing members.

Q. Now, you have, I notice in the model which you have produced, a belt traveling in the run-way. Is that one continuous belt from the feed end of the machine to the discharge end and back, or is it a series of belts? [395]

A. It is an endless belt which travels from one end of the machine to the other.

Q. (By the COURT.) What do they put those wheels in there for?

A. That is to make a series of openings. If you would run that in a straight line, you would adjust this belt to get away from your pulley, so that the weight of the fruit would not dislodge it. In other words, to assort them to accurate sizing so it can't get away from it. If you have no such board on there you would have no control over that belt. It might be up on top of the fruit or down underneath it.

Q. (By Mr. ACKER.) Now, these adjustable members which are arranged in longitudinal succes-

(Testimony of Charles F. Brookhart.)

sion throughout the length of the fruit runway, I understand you to say are individually and independently adjustable relative to the opposing member of the fruit runway, is that correct?

A. Yes, sir; that is correct.

Q. Now, in function and operation, how do the adjustable sections differ or correspond with the adjustable sections in the defendants' device for moving the carrier belt toward or from the opposing member?

A. The function of both devices is the same, because it flexes the member towards the rotating wall member, or away from it, whichever way you want to vary your sized fruit.

Q. And as I understand your testimony, in the Ellithorpe [396] device, and as represented by the model exhibit, the variation in the discharge outlets for the fruit runway is accomplished by flexing the endless traveling carrier member?

A. That is the idea; both devices perform the same function in flexing the belt toward or from the rotating wall member.

Q. I understand you to state that this model was made by you from the disclosures gained from the Ellithorpe letters patent. A. Yes, sir.

Q. Does it correctly represent the said device?

A. Yes, sir; as far as the sizing of the fruit is concerned, it is correct. [397] Of course, we don't make the same shaped hopper, the sizing element—that is, the parallel members, the rotating wall member and the individually adjustable members were

(Testimony of Charles F. Brookhart.)  
made from the disclosures in the letters patent.

Q. What have you to say relative to the practicability of such constructed apparatus for sizing fruit?

A. I see no reason why it should not be a practical fruit sizing device.

Mr. ACKER.—I offer the model in evidence, and ask that the same be marked Defendants' Exhibit Model Ellithorpe Patent.

The CLERK.—“N.”

Mr. ACKER.—“I,” I would make it, together with the attachment thereof, which was removed by the witness.

Mr. LYON.—Objected to as incompetent, not the best evidence, and no foundation laid for the introduction in evidence, and not true to the teachings of the drawings or specifications of the Ellithorpe patent.

Q. (By the COURT.) You say it is?

A. Yes, sir; only I said that in the disclosure in the patent it is constructed with two stories and a double sizing element on each side, and we just constructed it with the one parallel run to show the action of the roll members, conveying belt, and the adjustability of the individual plates to retain the sizes of fruit.

The COURT.—Objection overruled.

Mr. LYON.—Note an exception. [398]

Q. (By Mr. ACKER.) Mr. Brookhart, the Judge yesterday asked concerning a sketch of the connections between the roller members of the rotating wall surface. Have you prepared such a sketch?

(Testimony of Charles F. Brookhart.)

A. Yes, sir; I made a sketch. I believe you have it somewhere there.

Q. Is this the sketch which you have reference to? (Hanging paper to witness.)

A. Yes, sir; that is the sketch of the bearings and the rotating wall member.

Q. Now, does this sketch correctly represent the manner of connecting the roller members of the rotary wall member of the defendants' sizer, and relative to the bearing bracket therefor?

A. Yes, sir; that bracket represents the bearing, and the casting that is set in the end of the roller. Of course, I have cut the bearing off because I didn't have paper enough to draw it all on, and this is the bearing as it is installed in the defendants' device, with the square shafting in the center connecting the two sections together.

Q. Now, I wish you would mark on this sketch by the reference numerals 1 and 2 the adjacent roller members of the rotary wall member of the defendants' device. A. You mean the roller members?

Q. Yes.

A. (Marking on the sketch.) This is the plain copy.

Q. (By the COURT.) What do you call that? (Indicating [399] on the sketch.)

A. This is the roll member. This is one end, and this is the small end of the adjacent—

Q. What is it? I don't understand you.

A. Well, this part right here (indicating), this piece in here represents the casting that goes in the

(Testimony of Charles F. Brookhart.)

end of the wood roller, and it is fastened in here with screws. This surface here marked F is the finished bearing surface.

Q. F?

A. Yes; that is the sign we make for castings to be finished, and this is the wood part of it. It is fastened in there with screws, and this casting is chilled; in the making of this square shaft we chill that to prevent wear, and we make it as near the size of the finished shaft as we can in order to get it in, because you can't do any work on a chilled casting, and there is one of these castings on each end of each section.

Q. (By Mr. ACKER.) Now, how are those ends connected together for rotation?

The COURT.—What is this exhibit marked?

Mr. ACKER.—I haven't come to the marking of it. The sketch referred to by the witness is introduced in evidence and marked Defendants' Exhibit "N."

Mr. LYON.—Let me see it. (Receiving sketch.) If I have an objection to the sketch, I will make it in a moment.

Q. (By Mr. ACKER.) Do I understand from your testimony that each of these members of the rotary wall member of the [400] fruit runway is united in that one?

A. Yes, sir; that is correct.

Q. Please state what flexibility or elasticity, if any, is permitted the roller member of the fruit runway when connected in such manner.

(Testimony of Charles F. Brookhart.)

A. There is practically no flexibility of the roller member, because the nature of that bearing requires that be in perfect alignment, and if you flex it any, it tends for that bearing to bind on the bracket member and cause the bearing to cut and wear out, and it must be preserved in a straight line. [401]

Q. And when so connected, what is its action in comparison with the action of an integral roll extended the entire length of the fruit runway?

A. I don't get the kind of a roll you said.

Q. A solid roller or shaft?

A. Well, that practically becomes a solid roller, and it has the action of a solid roller from end to end of the machine, continuous, and by being joined together, because if you take any one section out of there, the balance of the roll would cease to rotate, so, in effect, it is a solid roller rotating wall member.

Mr. ACKER.—You may take the witness, Mr. Lyon.

#### Cross-examination.

(By Mr. LYON.)

Q. You don't mean to tell us that these machines of the defendants at Porterville, if the brackets holding the roller sections were adjusted by turning the bolts and nuts D', this roller section at that point could not be flexed a quarter of an inch and still the whole roller section rotate in unison perfectly, do you?

A. I would like to have that question repeated to get the sense of it.

(Testimony of Charles F. Brookhart.)

The COURT.—Let us see, Mr. Lyon, if I cannot put that to the witness.

Q. If you will look at exhibit 4, you see the joint A? A. Yes, sir. [402]

Q. Where C and D are joined together?

A. Yes, sir.

Q. Now, if you were to move A toward the belt a quarter of an inch, would that effect the rolling of the members?

A. Yes, sir, that would grip that bearing on what we call the female bearing on the roller end on the male end of the brackets and it would cut itself out.

The COURT.—That is what you wanted, Mr. Lyon?

Q. (By Mr. LYON.) Would an eighth of an inch adjustment do that?

A. My opinion, less than an eighth of an inch adjustment—I wouldn't recommend any adjustment to prevent that bearing from gripping and cutting a bearing and wearing it out.

Q. Now, you designed the same bearings and connections in the roller sections of the machines in the Riverside Heights Orange Growers' Association, the last machines that were put in there, didn't you?

A. I did not.

Q. Are you familiar with those sections and connections? A. I am.

Q. They are practically identically the same connections that are in here, aren't they?

A. No, sir; they are not.

Q. Where do they differ?

(Testimony of Charles F. Brookhart.)

A. The bearing on the bracket end is only a very narrow [403] bearing, so as to allow a little flexibility there.

Q. And so, according to your statement, there is no flexibility, and they can't be flexed at all?

A. That is my statement.

Q. Now, were you present when his Honor, the present Judge, was at these machines in Porterville in December last? A. I was not.

Q. Did you ever try to make an eighth of an inch adjustment of these bearings and measure it up with a grader gauge, and then see if the device would run?

A. Never tried it because there was never any need for it.

Q. Now, as a matter of fact, why then is it that you have to have an adjustable bracket on there at all?

A. You have to get your initial alignment of that roller section with your carrier member which travels beneath it.

Q. Did you ever use in the Parker Machine Works any such adjustable bracket in any grader before this installation, or is this a new form of adjustable bracket which was gotten out for this particular purpose?

A. It has no adjustable bracket at all; it was not gotten out to be adjustable.

Q. What is the purpose then of the slot and connection by bolts and nuts?

(Testimony of Charles F. Brookhart.)

A. Do you want the detailed purpose?

Q. I asked you what was the purpose of the slot there and the bolt if it was not for an adjustment.

[404]

A. Oh, I will tell you. In the first place, these brackets are mounted on the castings. It comes out of the foundry rough; there is no machine work at the point where they are mounted. Any mechanic knows there is more or less distortion in any casting coming out of the foundry unless you machine that and surface it up. We could mount those by drilling holes, but that would require lining up all brackets, marking off the holes and taking it to a drill-press in order to get them correct. [405]

Now, that is one reason. The other reason is by having these slotted holes, if one of these bearings wears out, we could ship one to the shop, put it in place, line it up, tighten up the bolts, and it would be in place and it would require no mechanic to put that up.

Q. Now, all very well. All of that is a matter of adjusting that bracket, two pieces of it, so you get it in the position you want it?

A. The initial alignment.

Q. Isn't that the adjustment of it?

The COURT.—You can answer that question yes or no.

A. No, sir; I don't consider it an adjustment.

Q. (By Mr. LYON.) What is an adjustment?

A. The purpose of it is to raise that up or down.

(Testimony of Charles F. Brookhart.)

Q. Isn't that what you do in order to get that in alignment? Don't you move those two parts in relation for that purpose?

A. Not after the machine is installed.

Q. I am asking you when you install it.

A. When we installed them we lined those up.

Q. And that is by moving those two brackets on the bolts?

A. Yes, sir; we have to line up those brackets.

Q. Now, when that bracket was first designed for this first Porterville job, was it designed to be used just as it is now used?

A. Yes, sir; we had no intention of making any adjustment [406] on the machine after the machine was installed, ready for operation.

Q. Then why did you put on such brackets, the further projection, together with the rod, screw threaded in its lower end, and the nut represented by 4 in Plaintiff's Exhibit 5, such being apparently a lock nut?

A. That was put on there in order that this nut—in case this nut would loosen up, the bearing would not drop out of alignment.

Q. In other words, it was a lock nut?

A. It was to prevent this bearing getting out of alignment.

Q. You found that by slightly riveting the top of the bolts D', you could do away with that lower lock nut?

A. We riveted those so they could not be adjusted.

Q. Answer the question. You found that by riv-

(Testimony of Charles F. Brookhart.)

eting the top of the bolts D' slightly you would not need that lock nut 4; isn't that true?

A. If I remember rightly, those lock nuts were cut off before we riveted them over at all.

Q. Answer the question.

A. I can't say that we found any such thing and be truthful about it.

Q. Why then did you remove the bolts and nuts 4?

A. So there could be no adjustment made of the roller.

Q. Then the intention when you put on the bolts 4 was to [407] leave an adjustment there, wasn't it? A. No, sir; it was not.

Q. Now, the roller side of these Porterville machines terminates 45 inches from one end of the machine, doesn't it? I am not speaking of the shaft; I am speaking of the grading roller as shown, for instance, in exhibit 4, at the left-hand side of the photograph.

A. You mean the grading of the wood section?

Q. Yes; the grading roller. The grade section.

A. Yes; they do not go clear to the end of the machine.

Q. Then, your bin space is extended beyond the length of that grading roller, is it?

A. It is beyond this grading roller; this last roller, but not the complete roller member, because that is a part of it; that is the guiding end of it; that is a part of it.

Q. In that sense I agree with you. Then, you did not mean to tell the court that the bin space of those

(Testimony of Charles F. Brookhart.)

machines was not extended beyond the grading member, did you?

A. I understand that is a complete grading member from one end of the machine to the other, and it is not separate.

Q. Then in your testimony when you refer to a part, you look at it as a thing regardless of what it does, and say it keeps on extending, although part of it may extend there, having no function; is that it?

A. That part has a function. The over size fruit passes [408] into the bins.

Q. Where does the roller part of that, that is, the rod, have any function at that portion as a part of the grader?

A. I don't think it intended to have any function, because the over size fruit passes under that down into the bin.

Q. Then, how much of the end of that is anything more than an extension for convenience to rotate a bearing in the distance?

A. Well, of course, that shaft has no bearing. [409]

Q. That is what I mean, and if you extended that shaft to 100 feet to its bearing, the rest of the 100 feet would be still a part of the grade roller extension as you used the term on your direct examination, wouldn't it?

A. I consider the whole thing one roller grade member, and that is the end of the sizer bin.

The COURT.—In exhibit 4, I think the place you

(Testimony of Charles F. Brookhart.)

are talking about is the mark B.

Mr. LYON.—B, yes.

The WITNESS.—The letter B.

Q. (By the COURT.) Now, you say the over-sized fruit comes out under B? A. Yes, sir.

Q. And drops into the bin?

A. And drops into the bin that is lying between these two brackets.

Q. And is it necessary to have such a space in any sizer?

A. Yes, sir; they must have a space for taking care of this fruit that passes beyond the last size. I don't know the size of the fruit, what these large sizes are, but there is always some that is over-size, and they take care of that in the last bin.

Q. Would you construct one of these machines without having a slot and bolt D'?

A. Well, it would require a great amount of care and labor to do so, because we would have to make gigs. As you [410] understand, the roller member is varied in distance from the conveying member, from an inch and a quarter to an inch and a half from one end of the machine to the other, and that would necessitate in each set of bearings a change in the distance, and each one of those would have to be a different center from the bearings of the whole, and that, of course, would require a set of gigs, and according to my experience in mechanical lines, it would require the machine—the face of the frame on which those brackets are fastened, and the face of the bracket itself, in order to preserve that

(Testimony of Charles F. Brookhart.)

perfect alignment, and to avoid all that expense. Of course, we use this slotted bracket in order to save that.

Q. That slotted bracket only has one motion, doesn't it, the motion up and down?

A. This is all you could get out of it.

Q. Yes. Just one motion.

A. To loosen up those bolts and get the up and down motion.

Q. And give the two motions, forward and back or up and down?

A. Well, we call it up and down because the angle is greater to the vertical than horizontal.

Q. Now, couldn't that same adjustment be made on the frame where that bracket is fastened to the frame?

A. You mean to put the slots in the frame itself?

Q. At the frame roller it is fastened beyond the frame, and couldn't it be adjusted there instead of having two [411] brackets, having one solid bracket and just the solid bracket to the frame?

A. No, sir; that frame forms part of the machine; it sets on the rafter, and there one part of it which supports this lower table, and there is one part that carries the belt conveyor, and there would be no way I know of we could rest that up and down in order to get alignment, because the table is lined up with the casting on the top, and there must be some means of raising or lowering the roller member in order to align it with that table.

Q. There is no way of constructing this roller

(Testimony of Charles F. Brookhart.)

from one end to the other without at the time of constructing it having an adjustable bracket?

A. Some way of adjusting that bracket to line up the roller with the traveling conveyor, yes, there must be some means there, unless, as I say, you take each bearing, mark the hole and drill it and put it in place, and that would require a set of gigs for each set of brackets, and it would cause lots of trouble. If you would break a bracket, you would not know which one they wanted without special instruction, and with the bracket with the slotted hole, we could ship one out of stock and they can line up the roll member and have it ready for operation in a few minutes.

Q. All these brackets are cast in the same mold, are they? A. Well, we have a pattern for it.

Q. That is what I mean. [412]

A. Yes, the same pattern for all of them.

Q. All made the same size?

A. Yes, sir; remembering the distortion is always according to the metal that is put in. There may be a little more shrinkage at one time than another. Of course, that is common to all foundries; that is usual. [413]

Q. (By Mr. LYON.) Now then, again referring to exhibit 5 I hand you, the shaft or belt marked 4 on that, there are two nuts, aren't there?

A. Yes, sir.

Q. Now, why were two nuts used on there, one for a jamb nut and the other for a lock nut?

A. That is the idea, but I believe this picture was

(Testimony of Charles F. Brookhart.)  
taken before the installation.

Q. This picture was taken before you turned over the machines to the use of the Porterville Citrus Association, it is true, but you and the Parker Machine Works put those nuts and bolts 4 on there, didn't you? A. We did.

Q. And that was part of this installation?

A. That was installed as part of the installation.

Q. And then you took and removed the nuts and bolts 4, and you just simply riveted the top of the bolts of the same lock nut?

A. Cut that all off entirely so it could not be moved.

Q. Now, what was the purpose of putting lock nuts on that, like the bolt and lock nuts 4 originally?

A. I believe I said a bit ago that it was put on there in case these nuts would loosen up, to prevent that from working away from the alignment.

Q. Then you did rivet over the top of the nuts or bolts D', so as to prevent that pair of bolts from loosening from the jarring of the machine? [414]

A. No. We didn't do that to prevent the jarring loose. If we wanted to prevent it from jarring loose, we would put on a jamb nut, or many of the devices provided for that purpose.

Q. Then you did intend originally when you put on the bolts and nuts 4 to use an actual adjustment of these slotted brackets?

A. I had no intention—

Q. Now, explain to us what your difference in intention of those two jobs was, there was some dif-

(Testimony of Charles F. Brookhart.)

ference mechanically. Now, why did you make the change? You say first that was put on there, parts 4 as a lock and jamb nut to prevent the additional jarring and loosening of the brackets, so that they would automatically, by said jarring, adjust themselves, and then you say you took those off and simply riveted over the top of the nuts D'. Now, why was the change, and why did you have the first thought?

A. We took those lock nuts off so there would be no adjustment made to that bracket; that is why we took the lock nuts off.

Q. (By the COURT.) Why did you put them on there?

A. I said the first thought was to hold them in position in case they should loosen up. To prevent any adjustment being made, we cut them off and riveted those over so we couldn't move them. Of course, we shouldn't have let it gone out like that, but there was no intention, [415] absolutely, of making any adjustment to that roll member.

Q. (By Mr. LYON.) Now, Mr. Brookhart, you know absolutely all you have to do to make one of those adjustments is to put on a small wrench and turn those nuts and that bolt.

A. You can't move that member without demolishing the machine.

Q. You can move one of those nuts by putting a wrench on there and turning the thread.

A. You mean you want to know if you can take that nut off?

(Testimony of Charles F. Brookhart.)

Q. No; I said you could loosen the nut and run it up for an eighth of an inch or less, and slide the two parts up or down, and then turn it down again with a small wrench.

A. You could loosen up that nut, but you would destroy your thread by doing so.

Q. Wouldn't your thread go back down and hold it?

A. I wouldn't think so, no.

Q. Were you ever called upon to replace the bolts and nuts that were on any one of those adjusting brackets in the Porterville machine to-day?

A. They have not ever been.

Q. You are not aware of the fact that in December last one of those nuts by an ordinary wrench with very slight pressure was loosened by myself and re-set after adjusting one of the rolls a full quarter of an inch, as measured by a grader gauge, and then put back in the place? [416]

A. I know nothing about it at all.

Q. Never tried it at all, did you?

A. No, sir; I never did.

Q. Now, I believe you told us that the feed end of these Porterville machines, the roller there was closer to the grading belt than at the foot or last delivery end; is that correct, so that the entire roller section is inclined with relation to the horizontal movement or line of movement or plane of the traveling grader belt.

A. Yes; if my memory serves me right, the small fruit comes out where the fruit is delivered on first;

(Testimony of Charles F. Brookhart.)

that would be the end closer to the end of the table, and as you get away, would be increased sizes.

Q. And then how much higher at the last grade opening than at the first grade opening at the receiving end of the machine?

A. Well, I should say about an inch and a quarter to an inch and a half; I couldn't say only approximately.

Q. Now, the standard difference in the grades is affected by a difference of one-eighth of an inch in the width of the grade opening, isn't it?

A. I believe at Porterville they had a difference as much as a quarter.

Q. In each grade? A. In some grades.

Q. Well, I say the standard grade. I am speaking of standard grade. [417]

A. As far as I know, they are.

Q. And an adjustment of one-eighth of an inch to the roller toward or away from the belt will affect a whole grade in the sizing of oranges?

A. Let me have that question again.

The COURT.—I don't think that is important.

Mr. LYON.—He is an expert.

A. I don't know anything about the grading of fruit. I only know about the mechanical construction. I don't do the adjustment of the rolls.

Q. Then you had nothing to do at all with the alignment and adjustment of the roller ways of these Porterville or Mid-California machines?

A. Only supervising the construction.

Q. And you don't know what the difference be-

(Testimony of Charles F. Brookhart.)

tween the different grade openings was?

A. Well, I know the standard is approximately about an eighth of an inch; I don't know what these were set at.

Q. Then you don't know, as a matter of fact, whether a flexing, if you call it that, of these joints, a minute fraction of an inch, less than an eighth of an inch, would be practical or impractical, or whether from the practical standpoint changing the grade could be effected by that kind of a machine, do you?

A. All I am testifying is the effect on those bearings for changing that roller bearing. Of course, there is a [418] provision made under the belt, conveying member, to get your adjustment, and there is absolutely no necessity for making any change on the roller member. If there was, they wouldn't put in the means for getting it underneath, which is very simple. There is no call for any adjustment of the roller member, and there is no intention of any adjustment there.

Q. Now, how long have you been employed by the Parker Machine Works and George D. Parker?

A. Well, I have been there ever since he took charge of the shop, but I don't remember what year that was; 1909, I think; I am not positive of that.

Q. It was either 1909, 1910 or 1908.

A. I was with the shop—of course, I have been there 11 years.

Q. And you are still in his employ?

A. I am in his employ at present.

(Testimony of Charles F. Brookhart.)

Q. And you have testified in other cases as an expert witness?

A. I don't know as an expert. I have testified in cases.

Q. You have testified as an expert in the Box Nailing Machine case, haven't you?

A. I guess they call me that. I wouldn't take the honor.

Q. (By the COURT.) Well, were you called on to give [419] your opinion upon some things?

A. Yes, sir; I was called on for my opinion. If that constitutes an expert witness, I guess I was.

The COURT.—We will take a little recess of about five minutes.

(Recess.)

Q. (By the COURT.) Now, as I understand here, you take that Exhibit 4, these bolts D', the nuts of them are swollen?

A. Yes, sir; riveted over the top of the nut. [420]

Q. Now, do I understand you to say you couldn't loosen that up so as to slide that slot without destroying that bolt?

A. The tendency would not be that way.

Q. Couldn't that be worked two or three times without destroying the bolt?

A. Oh, it might possibly be worked that many times.

Q. If you unscrewed that bolt, the bolt would cut its way through the bolt—the nut would cut its way through the bolt for a time, when you turned it around once or twice and then turned it back again,

(Testimony of Charles F. Brookhart.)  
and swelling the end of the bolt again?

A. That might be possible, yes.

Q. Now, isn't it the practice of machinists to swell the nuts of bolts instead of putting on a lock nut?

A. Not if they wish to remove parts so fastened together.

Q. I know, but to keep it from shaking loose.

A. From the jar and shock, yes, sir.

Q. They swell the nut of the bolt?

A. The custom is to put jamb nuts on so it can't loosen up; it has been my experience.

Q. I don't know how machinists do. I know how farmers do it in thrashing machines.

A. It is probably because you have no bolt long enough to put that nut on.

Mr. LYON.—Right in that connection, I have been unfortunate [421] in the past few years in having to wear glasses and the nuts have become loose, and I have always riveted them down that same way. I found they turned too much—too dead easy.

The WITNESS.—What I wish to say here is that if we intended to move those after we once fastened them, if we intended to move them, we couldn't move them without putting a lock nut on.

Q. (By Mr. LYON.) You did put that lock nut on like the nut 4.

A. I have reference to these nuts.

Q. Now, as to the other one. Didn't you originally put the lock nuts 4 on, as shown in Plaintiff's Exhibit 5, for the very purpose we are speaking about?

(Testimony of Charles F. Brookhart.)

A. Yes; we have put them on so they couldn't be moved, and then for fear that they would be moved we made this change.

Q. Now, you say these slotted brackets and castings, those are cast in the rough, and that also these bearings like the sketch that you have produced here for the connection of the ends, and I think that sketch is Defendants' Exhibit "N," those parts are cast in the rough, too, are they? A. Yes, sir.

Q. Not machined at all?

A. They are machined before they are used.

Q. Well, how much are they machined on the inside?

A. The bearing where it works on the bracket, the casting [422] that goes in the end of the wood roller, is called a female bearing; that end is bored out to make it the proper size. The bottom is faced off, and then the hubs of the bracket, one on each side, is machined with another tool and is called the male end, and that is finished to size that forms the bearing. The roll rotates on the bracket.

Q. But the screw holes of the female part of that are not in any manner machined, are they?

A. Not machined.

Q. They are in the rough?

A. They are chilled.

Q. Now, there must therefore be some looseness in there or you couldn't fit a square rod into them, isn't that true?

A. They are made just large enough so this half-inch square will fit through there without driving.

(Testimony of Charles F. Brookhart.)

Q. And that will allow more or less flexing of those rods, isn't that true?

A. If the roller members were supported by the square shaft, they wouldn't be possible of flexing, but I had reference to the member of the roller end that is fastened on the end of this bearing.

Q. Then, as a matter of fact, you can still raise the whole bearing up and it will still run?

A. I wouldn't admit it would run, because I know we had trouble in that so-called flexible bearing on that sizer installed in the Riverside Heights. We didn't get them in [423] line and we had to replace them.

Q. And you are still running those with the flexion, aren't you?

A. I don't know of any change; I don't know anything about that.

Q. Now, there is more or less distortion or flexion of this whole shaft or line of roller section on each one of these machines in the 35 or 40 feet of it, isn't there?

A. Well, I don't know as you would say there is any flexion. Those brackets are lined up so the roller will revolve freely without any friction.

Q. There isn't any rotation of these square pieces in their square holes. The rotation all comes on the bearing portion that is on the end of the top of this slotted bracket, isn't that true?

A. The purpose of the square steel in there is it is rolled on the end and forms a continuous rotating member.

(Testimony of Charles F. Brookhart.)

Q. And if one of those rolls is slightly out of line and the next one is slightly the other way, it will still rotate without over distortion of that square rod, isn't that true? Say that one of them had a sixteenth of an inch out on one side and the other was a sixteenth on the other to correspond?

A. We aim to prevent any chance of those being out of line. We put them in the jig and bore them.

Q. Answer my question.

A. It is possible that the square part of the roll would [424] be a little out of line with the square opposite side of the adjacent member.

Q. (By the COURT.) What do you call it in mechanics when a shaft is bent? Do you call that an elbow?

A. Well, it depends on the degree of the bend. If it is bent 'way around it is called an L.

Q. I know, but a shaft gets out of line so it does not run true. What do you call that?

A. We just call it a crooked shaft, I guess.

Q. Now, is there any crook in this?

A. No, sir; no crook in that at all. You couldn't size fruit if that roller went out of line, because if the fruit runs up on the high side, it will run under.

Mr. ACKER.—That would form an eccentric surface.

A. It would form an eccentric surface.

Q. What you call an eccentric or a cam.

Q. (By Mr. LYON.) Calling your attention now to Exhibit Number 8, the side of that in the bins shows only four of the removable bin partitions, is that correct?

(Testimony of Charles F. Brookhart.)

A. Yes; there are only four in place.

Q. And Exhibit Number 6 shows a much larger number?

A. A much larger number in place, but they are not in place for operation.

Q. Well, they can be placed in any position along there that the operator desires?

A. There is one bin board furnished for each section of [425] the roller.

Q. And those can be put anywhere along from the width of the smallest orange up to several feet in length, slid right along the machine?

A. Well, you mean while the machine is in operation?

Q. At any time that you wish to shove them, unless the fruit is right heavy against the side towards which you want to move it? A. Yes.

Q. They can be adjusted absolutely at the will of the operator? A. Yes.

Q. And that adjustment was intended to be with relation to where the fruit was to be delivered from a given barrier board, I believe you call it, wasn't it? You refer to the boards marked H in Plaintiff's Exhibit Number 5 as barrier boards.

A. Yes; that is what we call a barrier board; in this photograph, of course, placed wrong.

Q. And which end, or near which end of such barrier board there is a bolt passing through it?

A. Yes, sir; sort of a wooden bolt.

Q. And the lower end of that will pass through the slot between the two bolts? A. Yes, sir.

(Testimony of Charles F. Brookhart.)

Q. And as a matter of fact, those boards can be placed in [426] the very positions shown in this photograph, Plaintiff's Exhibit 5, can they?

A. Yes.

Q. And there can be practically any arrangement of those that is desired by the operator, can't there?

A. You can place the boards anywhere you want, but you can't obtain the function for which they are made placed at that angle, because you would change the angle of it. In other words, those two bolts are a certain distance from center to center, and you place those boards on an angle in which the center of this slot—the distance from the center of that slot would register according to the distance from the center of the boards. [427]

Q. The barrier boards in figure 5 have these bolts in the slots, haven't they, those on the left-hand side that are inclined to the longitudinal extension of the belt?

A. One of the boards evidently has both bolts in the slot. The other evidently didn't register in the slot, and we didn't get it in. The third one only shows one bolt.

Q. The one that is up in the photograph. It may be that the slot is not quite wide enough for the head or hook, as you called it, on the head of the bolt.

A. It is a hook bolt to spring on the top.

Q. And the hook might not have been the right size to slide through the top?

A. I wouldn't say as to that. It looks as though it wouldn't register as to the slot, and we couldn't get it in.

(Testimony of Charles F. Brookhart.)

Q. Now, are these barriers H at the right hand side of this photograph, Plaintiff's Exhibit No. 5, in the positions that you have seen them while these Porterville graders were in use?

A. Well, they were placed longitudinally with the belts. Of course, I don't know if they were placed in the right relationship to the fruit aperture; I can't say as to that, but they are supposed to be placed parallel to those belts.

Q. Now, your attention has been directed to a patent to Ellithorpe on direct examination, and you produced a model here. Did you ever see a fruit grader in use like that [428] model?

A. No; I never saw one in use like it.

Q. You have been in the business of manufacturing and installing fruit graders the last eleven years, I believe you said? A. No, sir.

Q. Well, what portion of that time?

A. I said I worked with the machine works I am with at present for that length of time, but only in the manufacture of sizers during the last three or four years.

Q. And during that time have your activities been confined exclusively to California?

A. Just what do you mean by that?

Q. Have you also been outside of the State of California for Mr. Parker during that time?

A. I have not.

Q. You never saw a machine like that in use anywhere in the packing industry in California, did you? A. No, sir; I never have.

(Testimony of Charles F. Brookhart.)

Q. Did you have that patent or device before you when you were making the Porterville machines?

A. No, sir; I did not.

Q. You had seen Mr. Stebler's machines?

A. Yes, sir; I have seen Mr. Stebler's machines.

Q. And you had seen the infringing machines that were possessed by the Riverside Heights Orange Growers Association? [429] A. Yes, sir.

Q. And you knew of the installation that was made by Mr. Parker for the Pasadena Orange Growers Association, didn't you?

A. Well, yes, I knew he had installed sizers there.

Q. Did you make drawings for that machine also?

A. No, sir.

Q. Do you know the trap door arrangement that he first put on those machines for adjusting the belt toward and away from the roller sections?

A. I can't say that I can describe that.

Q. You know there was a trap door effect?

A. I know there was some sort of a device for flexing the belt, but I don't know what it was.

Q. And you know that he nailed that up and didn't use it in Pasadena machines, don't you?

A. No, sir; I don't know. I don't know but what it is in use to-day, so far as I am personally concerned.

The COURT:—Is there in evidence a drawing of this thing that goes up between the belt in the defendant's machine that raises and lowers it?

Mr. LYON.—There is a sketch of it, that is all; a sketch of Mr. Knight's.

(Testimony of Charles F. Brookhart.)

Q. You made this model of the Ellithorpe device in accordance with all the knowledge and light that you had of the building of a grader, and in connection with your [430] reading of the Ellithorpe patent, did you?

A. Yes, sir; that was the best I could do.

Q. That is the best grader that, following the teachings of the Ellithorpe patent, you could make?

A. I tried to follow the disclosures of the Ellithorpe patent in constructing that model, yes, sir.

Mr. LYON.—You may take the witness, Mr. Acker.

Redirect Examination.

(By Mr. ACKER.)

Q. Your attention was directed on cross-examination to what is termed jamb nuts as disclosed by complainant's photo exhibits. Is my understanding of your testimony correct that these jamb nuts were used during the aligning of the machine, the setting of it up, to hold the roller member in position as it was aligned throughout the length of the grader?

Mr. LYON.—That is objected to as leading and suggestive.

The COURT.—I will overrule it.

Mr. LYON.—Note an exception.

A. Answer the question? Well, my idea of the function of that was merely to hold it in place while we were aligning it.

Q. (By Mr. ACKER.) If there had been any intent, or if the defendants' machines had been constructed and installed with an intent to have any ad-

(Testimony of Charles F. Brookhart.)

justment of the roller-wall member of the apparatus after it had been in use, what was the [431] purpose of providing for an adjustment of the carrier belt?

Mr. LYON.—That is objected to as argumentative and not redirect examination. The witness has been fully all over that; he told us all he could tell us, both on direct and cross.

The COURT.—I think it is asking the witness to argue the case.

Q. (By Mr. ACKER.) The model exhibit which has been introduced in evidence of the Ellithorpe patent was made, I understand, by you, from the disclosure and solely from the disclosure of the Ellithorpe patent?

A. Yes, sir; that is correct.

Mr. ACKER.—That is all, Mr. Brookhart.

Mr. LYON.—That is all.

#### **Testimony of N. J. Ofstad, for Defendants.**

N. J. OFSTAD, a witness called in behalf of the defendants, being first duly sworn, testified as follows:

Mr. LYON.—Just a moment. I will ask counsel for defendants if in order to show clearly the joint of these machines between the rollers, if Mr. Parker will not produce a set of the rollers and one of those connections. He has them on hand and would readily do it, and save us waiting and adjourning the case to get one of them; I mean that square rod, and so forth. If the defendant wants the Court to have fully before him that structure, he can readily bring

(Testimony of N. J. Ofstad.)  
one of [432] those up here.

Mr. ACKER.—I can't do it unless we adjourn—  
Mr. Parker would have to go to Riverside.

The COURT.—Can't you telegraph to Riverside,  
or telephone down there to send up those castings?

Mr. ACKER.—Mr. Parker says he does not think  
there are any at all in the place.

Direct Examination.

(By Mr. ACKER.)

Q. Please state your name, age, residence and occu-  
pation.

A. My name is Nicholas J. Ofstad; age 42; resi-  
dence, Riverside.

Q. What position did you occupy during the year  
1915 and the early part of 1916?

A. Why, I held the position as foreman from  
November 1st, 1915, until Christmas, with the  
Porterville Citrus Association.

Q. The Porterville Citrus Association?

A. At Porterville.

Q. Can you state, Mr. Ofstad, whether there is in  
use in the Porterville Citrus Association an appara-  
tus for the sizing of fruit which was supplied and in-  
stalled by Mr. Parker? A. Yes, sir.

Q. When was that machine installed and placed  
in operation? A. November 20th. [433]

Q. 1915? A. 1915.

Q. Please describe in your own language the said  
apparatus.

A. Why, this machine consists of a one-sizer roll  
in several sections sufficient for the number of sizes

(Testimony of N. J. Ofstad.)

required that we use in our business, underneath which is a carrier belt, which is an adjunct to this sizer, and in addition to that is the bins which the fruit drops into after sizing. The sizer, as a whole, is so far as the packing-house man is concerned—gave as much satisfaction as anything we ever had.

The COURT.—You will have to speak a little louder, Mr. Witness; there is so much noise here.

A. The machine, as a whole, so far as my view as this packing-house foreman goes, gave the best satisfaction of any machine I ever used in that house. It had all the necessary features about it to give us the proper sizing and dropping the fruit into the bins.

Q. (By Mr. ACKER.) What was the construction of that rotary wall member of the grade run-way of the sizer?

A. The construction of the rotary member of the sizer was practically one roller in different sections, forming the equivalent to a solid shaft, or a solid roller the entire length of the machine.

Q. How was the roller driven, the roller member of the machine? [434]

A. The roller was driven by power from the lower end.

Q. Please state whether or not there was any flexibility permitted the roller member of the run-way?

Mr. LYON.—That is objected to as leading and suggestive, and calling for the conclusion of the witness, and not for a statement of facts.

The COURT.—I think that is a statement of fact,

(Testimony of N. J. Ofstad.)

whether there was any flexibility to it. Overruled.

Mr. LYON.—Note an exception.

A. Why, there is no flexibility to the rollers at all.

Q. (By Mr. ACKER.) Did you have charge of the operations of those machines, Mr. Ofstad?

A. Yes, sir.

Q. And they were under your charge throughout the working period of the season? A. Yes, sir.

Q. Now, what means were employed, if any, in the said machines, for varying the discharge outlets for the sized fruit?

A. Why, there was a means provided underneath the belt; there was an iron plate about 15 inches long, about 3 inches wide, I should judge, that were fastened underneath the belt or the table, which the belt was resting on, and that plate was fastened by brackets to this table, and that plate had a screw with the lock nuts on, so in getting my adjustment for the proper sizes which I wanted, I simply operated those [435] lock nuts which operated this plate.

Q. That is, you raised and lowered the plate over which the belt traveled? A. Yes, sir.







